United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

JOINT APPENDIX

VOLUME 12 — TRIAL TRANSCRIPT — Pages 3202 to 3575

UNITED STATES COURT OF APPEALS
FILED
MAY 19 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

CRAVATH, SWAINE & MOORE
Attorneys for Plaintiff-Appellant
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN, Esq.
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Defendants-Appellees
ASCAP, et al.

HUGHES HUBBARD & REED
Attorneys for Defendants-Appellees
Broadcast Music, Inc., et al.
One Wall Street
New York, New York 10005
(212) WH 3-6500

STROOCK & STROOCK & LAVAN
Attorneys for Defendant-Appellee
Warner Bros. Inc.
61 Broadway
New York, New York 10004
(212) 425-5200

SIMPSON THACHER & BARTLETT
Attorneys for Defendants-Appellees
MCA, Inc., and Duchess Music Corp.
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

LINDEN & DEUTSCH
Attorneys for Defendants-Appellees
G. Schirmer, Inc., and
Associated Music Publishers, Inc.
110 East 59th Street
New York, New York 10022
(212) 758-1100

HOFHEIMER, GARTLIR,
GOTTLIEB & GROSS
Attorneys for Defendants-Appellees
Essex Music, Inc., and
Hollis Music, Inc.
100 Park Avenue
New York, New York 10017
(212) 725-0400

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

COURT PAPERS

VOLUME 1

	PAGE
Docket Entries	JA1
Complaint	JA19
Exhibit A	JA31
Exhibit B	JA33
Exhibit C	JA35
ASCAP Answer and Counterclaim	JA37
Excerpts from BMI's Answer and Counterclaim	JA64
Reply to ASCAP's Counterclaim	JA79
Reply Memorandum in Support of BMI's Motion for Preliminary Injunction, dated July 9, 1970	JA94
Appendix	JA115
Transcript of Proceedings of July 10, 1970	JA132
Affidavit of Amalya L. Kearse, sworn to April 26, 1971	JA170
Excerpts from Appendix to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, dated August 16, 1971	JA177
ASCAP's Reply Memorandum in Support of its Motion for Summary Judgment, dated September 3, 1971	JA185
Transcript of Proceedings of September 14, 1971	JA197

VOLUME 2

	PAGE
Excerpts from Plaintiff's Memorandum in Support of Its Rule 37 Motion to Compel Answers to Interrogatories, and Production of Documents, dated August 25, 1972	JA305
ASCAP Memorandum in Opposition to CBS' Motion to Compel Answers to Interrogatories and Production of Documents, dated September 27, 1972	JA314
Excerpts from CBS' Memorandum in Opposition to ASCAP's Motion for a Protective Order dated September 29, 1972	JA338
Excerpts from ASCAP's Trial Brief dated April 25, 1973	JA342
Excerpts from BMI Trial Memorandum dated April 25, 1973	JA353
Excerpts from Plaintiff's Post-trial Brief dated April 8, 1974	JA358
Excerpts from ASCAP's Post-trial Brief dated June 3, 1974	JA361
BMI's Post-trial Brief dated June 3, 1974	JA370
Opinion and Order of Lasker, J. dated September 22, 1975	JA584

TRIAL TRANSCRIPT*

VOLUME 3

	PAGES
Donald Sipes:	
Direct	14–149
Cross	150–328

VOLUME 4

Donald Sipes (concluded)	
Cross (concluded)	329–379
Redirect	380–381
Recross	382–397
Robert B. Wright:	
Direct	397–475
Cross	476–553
Redirect	553–560
Recross	561–562

* Corrections to the trial transcript appear at the close of each day's transcript:

pages of transcript	*corrections at pages*	*pages of transcript*	*corrections at pages*	*pages of transcript*	*corrections at pages*
1 to 127	127-1 to 127-8	1799 to 1954	1954-1 to 1954-4	3576 to 3748	3748-1 to 3748-12
128 to 328	328-1 to 328-8	1955 to 2108	2108-1 to 2108-7	3749 to 3919	3919-1 to 3919-13
329 to 563	563-1 to 563-6	2109 to 2458	2458-1 to 2458-10	3920 to 4081	4081-1 to 4081-9
564 to 753	753-1 to 753-5	2459 to 2623	2623-1 to 2623-6	4082 to 4241	4241-1 to 4241-10
754 to 903	908-1 to 908-4	2624 to 2801	2801-1 to 2801-5	4242 to 4426	4426-1 to 4426-10
909 to 1089	1089-1 to 1809-4	2802 to 2995	2995-1 to 2995-16	4427 to 4613	4613-1 to 4613-11
1090 to 1273	1273-1 to 1273-4	2996 to 3176	3176-1 to 3176-8	4614 to 4731	4731-1 to 4731-5
1274 to 1445	1445-1 to 1445-6	3177 to 3378	3378-1 to 3378-14	4732 to 4873	4873-1 to 4873-14
1447 to 1632	1632-1 to 1632-5	3379 to 3524	3524-1 to 3524-5		
1633 to 1798	1798-1 to 1798-8	3525 to 3575	3575-1 to 3575-2		

	PAGES
Edward Duke Vincent:	
Direct	571–647
Cross	647–671

VOLUME 5

Edward Duke Vincent (concluded):	
Cross (concluded)	672–726
Redirect	726–730
George A. Sunga:	
Direct	731–759
Cross	759–770
Albert Berman:	
Direct	771–851a 910–965
Cross	965–977
Redirect	978–987
Marion B. Mingle:	
Direct	852–885
Cross	885–888
Redirect	888–889
Recross	889–890
Burton Lane:	
Direct	988–999

VOLUME 6

Burton Lane (concluded):	
Direct (concluded)	1000–1160
Cross	1161–1172
Redirect	1172–1176
Allen H. Arrow:	
Direct	1255–1360

VOLUME 7

	PAGES
Allen H. Arrow (continued):	
Direct (concluded)	1361–1536
Eugene Goodman:	
Direct	1537–1592
Cross	1593–1600
Leon Kellman:	
Direct	1604–1631

VOLUME 8

Franklin M. Fisher:	
Direct	1636–1767
Cross	1768–1785
Walter L. Dean:	
Direct	1799–1823
Cross	1824–1861
Redirect	1862–1865
Allen H. Arrow (concluded):	
Cross	1962–1996
Redirect	1997–2003
Recross	2003–2005
Further Redirect	2006
Irwin Segelstein:	
Direct	2009–2032
Cross	2032–2042

VOLUME 9

Emil Poklitar:	
Direct	2044–2074
Cross	2074–2100
Redirect	2101–2102
Paul Marks:	
Direct	2400–2571
Cross	2571–2623

VOLUME 10

	PAGES
Paul Marks (concluded):	
Cross (concluded)	2624–2728
Salvatore Chiantia:	
Direct	2854–2910
Cross	2910–2932

Volume 11

Salvatore Chiantia (concluded):	
Cross (concluded)	2933–3058
Redirect	3058–3062
Recross	3062–3064
Alan Shulman:	
Direct	3065–3096
Cross	3097–3136
Redirect	3137–3138

VOLUME 12

Michael Dann:	
Direct	3213–3299
Cross	3299–3378
	3411–3439
John Green:	
Direct	3440–3460
Cross	3460–3476
Aaron Copland:	
Direct	3478–3487

	PAGES
Arnold Broido:	
Direct	3488–3497
Cross	3497–3501

VOLUME 13

Herman Finkelstein:	
Direct	3577–3660
Cross	3660–3829
Redirect	3829–3837
Robert R. Nathan:	
Direct	3842–3919

VOLUME 14

Robert R. Nathan (continued):	
Direct (continued)	3920–3968
Cross	3969–4206
Paul Marks:	
Direct	4207–4221
Cross	4221–4241

VOLUME 15

Edward Cramer:	
Direct	4244–4289
Cross	4290–4358
Paul Rosenthal:	
Direct	4358–4375
Cross	4376
Redirect	4376
Recross	4377–4378
Peter Q. Steiner:	
Direct	4378–4420
Cross	4420–4473
Redirect	4473–4475
Recross	4475–4480
Robert R. Nathan (concluded):	
Direct (concluded)	4526–4556
Cross (concluded)	4557–4613

VOLUME 16

	PAGES
Fred Silverman:	
Direct	4733–4759
Cross	4759–4766
Redirect	4766
Franklin M. Fisher:	
Direct	4767–4852
Cross	4853–4863
Redirect	4863–4864

DEPOSITIONS

VOLUME 17

	PAGE
Excerpts from the Deposition of Stanley Adams	D1
Excerpts from the Deposition of Allen H. Arrow	D66
Excerpts from the Deposition of Al Brackman	D70
Excerpts from the Deposition of Leon Brettler	D111
Excerpts from the Deposition of Salvatore Chiantia	D263

VOLUME 18

Excerpts from the Deposition of Cy Coleman	D331
Excerpts from the Deposition of Paul Fagan	D347
Excerpts from the Deposition of Herman Finkelstein	D546
Excerpts from the Deposition of Sidney Herman	D624

VOLUME 19

PAGE

Excerpts from the Deposition of Edwin H. Morris D641

Excerpts from the Deposition of William S. Paley D761

Excerpts from the Deposition of Emil D. Poklitar D766

Excerpts from the Deposition of Frank Stanton D852

Excerpts from the Deposition of Jerry Vogel D911

Excerpts from the Deposition of Ned Washington D938

Excerpts from the Deposition of Philip B. Wattenberg D991

Excerpts from the Deposition of Robert D. Wood D1013

EXHIBITS

VOLUME 20

Court Exhibit ("CX") No. 2—Stipulation between CBS and ASCAP, dated 5/25/72, in this action E1

CX 2, Exhibit No. 1—Standard form of CTN "Television Affiliation Agreement", dated 2/66 ..... E11

CX 2, Exhibit No. 2—Standard form of ASCAP writer and publisher membership agreement, Form 10M-1-72U, covering the years 1966-1975 ..... E19

CX 2, Exhibit No. 3—Standard forms of ASCAP "Application for Writer-Membership", Form 4M 11-71, with attached form of cover letter, and "Application for Publisher Membership", Form 2M 6-71, with attached form of cover letter E24

CX 2, Exhibit No. 4—Standard form of ASCAP writer and publisher membership agreement, Form 2500 7-65, covering the years 1941-1965 ..... E36

CX 2, Exhibit No. 5—Form of ASCAP "Television Performing Rights Agreement", supplementing the membership agreement (CX 2, Ex. 4) to include television performing rights E41

PAGE

CX 2, Exhibit No. 6—List of "ASCAP Affiliated [Foreign] Repertories", dated 1972 ..... E44

CX 2, Exhibit No. 7—Form of ASCAP Performing Rights Agreement used in connection with the foreign performing rights licensing societies listed in CX 2, Ex. 6 above, wherein ASCAP grants rights to licensee E46

CX 2, Exhibit No. 8—Form of ASCAP Performing Rights Agreement used in connection with the foreign performing rights licensing societies listed in CX 2, Ex. 6 above, wherein licensor grants rights to ASCAP E56

CX 2, Exhibit No. 9—"Articles of Association of the American Society of Composers, Authors and Publishers", dated 1/70 E68

CX 2, Exhibit No. 10—Amended Consent Judgment, dated 3/14/50, *U.S.* v. *ASCAP* (Civil Action No. 13-95) E124

CX 2, Exhibit No. 11—Order, dated 1/70/60, and attachments as amended to date in *U.S.* v. *ASCAP* (Civil Action No. 13-95) E139

CX 2, Exhibit No. 12—Pamphlet, whose cover is a letter, dated 6/28/63, from Stanley Adams "To All Members of the Society", describing the pamphlet's contents as "The ASCAP Survey" by Dr. Joel Dean, which Judge McGeehan suggested be distributed to all ASCAP members E209

CX 2, Exhibit No. 13—ASCAP Financial Statements for the calendar years 1960-1969, with attached cover letters from Stanley Adams to "Dear Member", dated 4/11/61, 4/19/62, 4/1/63, 4/18/64, 4/15/65, 4/20/66, 4/24/67, 4/4/68, 4/2/69, 4/8/70, respectively E254

CX 2, Exhibit No. 14—Standard forms of ASCAP license agreements, currently in effect:

Title	*Form No.*
Local Station Blanket Radio License	5M-11-69-U
Local Station Per Program Radio License	7500-9-67
Local Station Blanket Television License Agreement	—
Local Station Per Program Television License Agreement	— E285

CX 2, Exhibit No. 15—Standard forms of ASCAP license agreements, preceding the current forms (CX 2, Ex. 14):

Title	*Form No.*	PAGE
Local Station Blanket Radio License	3M-3-67	
Local Station Program Sustaining License	160	
Local Station Blanket Television License	1M-12-67	
Local Station Per Program Television License	1000 Jan. 1967(u)	E354

VOLUME 21

CX 2, Exhibit No. 16—Certificate of Incorporation of Broadcast Music, Inc., dated 10/13/39 ..... E371

Court Exhibit No. 3—Stipulation between CBS and BMI in *CBS* v. *ASCAP*, dated 10/15/71 ("So Ordered 10/26/71") E386

Plaintiff's Exhibit No. 12—Finkelstein Affidavit, dated 6/25/70 in *U.S.* v. *ASCAP (NBC Application)* E390

Plaintiff's Exhibit No. 14—Finkelstein Affidavit, dated 7/10/70 in *U.S.* v. *ASCAP (NBC Application)* E405

Plaintiff's Exhibit No. 24—Excerpts from ASCAP Brief on Appeal, dated 3/30/71, *United States* v. *ASCAP* (*Matter of Zekley*) E415

Plaintiff's Exhibit No. 53—AGAC Uniform Popular Songwriters Contract, bearing copyright dates: 1948 (SPA) and 1969 (AGAC) E430

Plaintiff's Exhibit No. 84—Letter dated 10/29/59 from Salvatore Chiantia to Miriam Stern E439

Plaintiff's Exhibit No. 102—Post-1970 pamphlet, "ASCAP—The Facts" E441

Plaintiff's Exhibit No. 106—Stanley Adams' "Remarks—AGAC Meeting, Hotel Edison, October 28" E448

Plaintiff's Exhibit No. 123—Letter dated 11/4/65 from Harold Spina to Miriam Stern E458

Plaintiff's Exhibit No. 124—Letter dated 11/19/65 from Michael H. Goldstein to Burton Lane E461

Plaintiff's Exhibit No. 125—Memorandum dated 1/24/66 from Abel Baer to Donald Kahn enclosing AGAC Counsel "Report to the West Coast Committee" dated 1/12/66 ..... E465

Plaintiff's Exhibit No. 127—Memorandum dated 4/22/66 from Leon Kellman to Burton Lane E470

PAGE

Plaintiff's Exhibit No. 133—Excerpt from "Report to New York AGAC Counsel from the West Coast Committee" dated 5/11/67 ..... E475

Plaintiff's Exhibit No. 134—Letter dated 5/18/67 from Burton Lane to Vic Mizzy E477

Plaintiff's Exhibit No. 135—Memorandum dated 7/25/67 from Burton Lane to AGAC West Coast Committee E480

Plaintiff's Exhibit No. 137—Excerpt of Report of the AGAC West Coast Committee Meeting dated 5/10/66 ..... E484

Plaintiff's Exhibit No. 162—Memorandum dated 10/19/59 from Miriam Stern to Alan Shulman enclosing Lane-Bernstein letters 10/2/59, 10/6/59, 10/14/59 and 10/15/69 ..... E486

Plaintiff's Exhibit No. 405—Blanket Network Television License Agreement between NBC and ASCAP, dated 1/10/58 as of 1/1/58, covering the period 1/1/58 through 12/31/61 (furnished by ASCAP as Exhibit M in connection with ASCAP Answer, dated 6/30/70 to CBS Interrogatory 28) E491

Plaintiff's Exhibit No. 430—ASCAP Supplementary Answer, dated 3/15/73, to CBS Interrogatory No. 26 ..... E533

Plaintiff's Exhibit No. 442—Form of BMI publisher affiliation agreement used from January 1959 to March 1969 (furnished by BMI as Exhibit 1 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9) E537

Plaintiff's Exhibit No. 443—Two forms of BMI publisher affiliation agreement used from March 1969 to August 1970 (furnished by BMI as Exhibit 2 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9) E543

Plaintiff's Exhibit No. 449—Two forms of BMI writer affiliation agreement used from December 1968 to July 1970 (furnished by BMI as Exhibit 8 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory 9) E552

PAGE

Plaintiff's Exhibit No. 458—BMI Answer, dated 3/23/73, to CBS Interrogatory No. 26 ..... E561

Plaintiff's Exhibit No. 469—BMI Writer Payment Schedule in effect as of January 1, 1972 (Dated September 1972) E563

Plaintiff's Exhibit No. 470—BMI Publisher Payment Schedule in effect as of January 1, 1972 (Dated September 1972) E570

Plaintiff's Exhibit No. 471A—BMI-Publisher Affiliation Agreement with a publisher where no previous agreement between the parties existed E577

Plaintiff's Exhibit No. 471B—BMI-Publisher Affiliation Agreement with a publisher canceling and superseding any prior agreement between the parties E582

Plaintiff's Exhibit No. 472—Current form of BMI-Writer Affiliation Agreement E587

Plaintiff's Exhibit No. 513—Affidavit of Edward M. Cramer, in this action, dated 10/21/70 ..... E592

Plaintiff's Exhibit No. 517—Memorandum of defendants ASCAP, et al. (by Paul Weiss), dated 11/10/71, in this action E598

Plaintiff's Exhibit No. 567—Excerpts from Statement of Herman Finkelstein, General Attorney for ASCAP on Hearing Before Special Subcommittee of the Judiciary Committee of the House of Representatives in Connection with Its Study of the Anti-Trust Laws, September 18, 1956 ..... E606

Plaintiff's Exhibit No. 568—Excerpts from Deposition of H. Finkelstein in *Cascade Broadcasting Co.* v. *ASCAP* E611

Plaintiff's Exhibit No. 572—Excerpts from deposition of Edward Cramer in *BMI* v. *NBC* E627

Plaintiff's Exhibit No. 575—ASCAP's Reply Memorandum (by Sullivan & Cromwell) dated 5/1/70, *United States* v. *ASCAP (Application of NBC)* E633

PAGE

Plaintiff's Exhibit No. 579—BMI pamphlet, "You—and the Music You Use", dated 7/69 ..... E646

Plaintiff's Exhibit No. 689—Letter dated 10/29/64 from Allen Arrow to George Lee E652

Plaintiff's Exhibit No. 722—AGAC Bulletin dated May 1966, Volume [illegible] No. 2 ..... E655

Plaintiff's Exhibit No. 839—Music Study, Summaries of Transactions, Songs and Plays of All Performances for 17 ASCAP Publisher Groups E660

Plaintiff's Exhibit No. 840—Music Study, Summaries of Transactions, Songs and Plays of Feature and Qualifying Performances for 17 ASCAP Publisher Groups E671

Plaintiff's Exhibit No. 866—Draft, dated 11/1/65 of 3MPX 27 .... E682

Plaintiff's Exhibit No. 899—Respondent's Conditional Offer of Proof, 4/17/62, *U.S.* v. *ASCAP (Shenandoah)* E692

VOLUME 22

Plaintiff's Exhibit No. 900—Transcript of 34th Annual Meeting of AGAC, November 1965 ..... E731

Plaintiff's Exhibit No. 908—Affidavit of Michael Dann, sworn to July 7, 1970, in this action E808

Plaintiff's Exhibit No. 962—H. Finkelstein Affidavit 12/21/61, in *U.S.* v. *ASCAP (Shenandoah)* E815

Plaintiff's Exhibit No. 986—Letter dated November 12, 1971, from Alan J. Hruska to Jay H. Topkis E825

Plaintiff's Exhibit No. 987—Letter dated November 18, 1971, from Jay H. Topkis to Alan J. Hruska E829

Plaintiff's Exhibit No. 992—Letter from Allan Blumstein to Alan J. Hruska dated February 12, 1974 ..... E831

3MPX No. 2—Memorandum dated 7/6/64, "ASCAP Performance Fee Proposal; 3M-700 Outright Sale Unit" E833

PAGE

3MPX No. 4—Letter dated 8/18/64 from J.M. Collins to Allen Arrow E838

3MPX No. 7—Letter dated 8/27/64 from J. M. Collins to Allen Arrow E840

3MPX No. 11—Memorandum "Tentative Proposal to ASCAP from 3M for Use in Connection with the 3M-700 Series" E842

3MPX No. 18—Letter dated 6/28/68 from Allen Arrow to M.E. Ricketts E845

3MPX No. 19—Letter dated 7/4/68 from Mr. M.E. Ricketts to Allen Arrow E847

3MPX No. 27—Letter dated 11/15/65 from Burton Lane to "Dear Publisher" E849

3MPX No. 42—Memorandum dated 12/28/74 from Allen Arrow to Milton Kramer E853

3MPX No. 43—Memorandum dated 1/12/65 from Milton Kramer to Allen Arrow E858

3MPX No. 47—Letter dated 7/15/65 from Alan L. Shulman to Allen Arrow E860

3MPX No. 49—Letter dated 10/11/65 from Allen Arrow to R.E. Lindgren E862

3MPX No. 72—Letter dated 11/17/65 from Lee V. Eastman to Allen Arrow E864

3MPX No. 75—Letter dated 4/22/66 from Allen Arrow to R.E. Lindgren E866

3MPX No. 144—Letter dated 11/5/64 from R.E. Lindgren to Arthur Israel E871

3MPX No. 145—Letter from E. C. Timberlake to A. Arrow, dated 12/1/64 ..... E874

3MPX No. 168—Memorandum dated 11/19/65 from Alan Shulman to Harold Richmond E879

PAGE

3MPX No. 171—Letter dated 12/4/64 from Allen Arrow to Phillip B. Wattenberg enclosing copy of a letter dated 11/27/64 from R. E. Lindgren to M. E. Ricketts E881

ASCAP Exhibit No. 126—CBS-BMI Television Network Blanket License dated 1950 with letters extending to 1969 ..... E888

ASCAP Exhibit No. 127—CBS-ASCAP TV Network Blanket License Agreements dated 10/17/49, 2/19/54 ..... E907

VOLUME 23

ASCAP Exhibit No. 127 (concluded)—CBS-ASCAP TV Network Blanket License Agreements dated 1/10/58 and 12/19/69 1042

ASCAP Exhibit No. 175—ASCAP-ABC Blanket License for ABC Television Network dated 1/10/58 ..... E1138

ASCAP Exhibit No. 184—Letter dated 10/2/59 from Burton Lane to "Gentlemen" E1229

ASCAP Exhibit No. 193—Contract dated November 5, 1965, between 3M and Fred Ahlert Music Corp. E1231

ASCAP Exhibit No. 194—Contract dated November 5, 1965, between 3M and Ahlert-Burke Corp. E1244

ASCAP Exhibit No. 195—Contract dated August 23, 1965, between 3M and Barton Music Corp. E1257

ASCAP Exhibit No. 196—Contract dated January 22, 1965, between 3M and Bourne Co. E1268

ASCAP Exhibit No. 197—Contract dated October 1, 1965, between 3M and Brandom Music Corp. E1278

ASCAP Exhibit No. 198—Contract dated February 2, 1966, between 3M and Chippendale Music Co. E1289

VOLUME 24

PAGE

ASCAP Exhibit No. 199—Contract (unexecuted) dated June 1, 1965, between 3M and Compton Music Corp. E1300

ASCAP Exhibit No. 201—Contract dated June 5, 1965, between 3M and Consolidated/Dorsey Bros. E1309

ASCAP Exhibit No. 202—Contract dated July 26, 1965, between 3M and Criterion Music Corp. E1319

ASCAP Exhibit No. 203—Contract dated August 19, 1965, between 3M and Four Jays Music Inc. E1328

ASCAP Exhibit No. 204—Contract dated April 14, 1966, between 3M and Frank Music Corp. E1339

ASCAP Exhibit No. 205—Contract dated October 1, 1965, between 3M and Holloway Publishers, Inc. E1352

ASCAP Exhibit No. 206—Contract dated January 25, 1965, between 3M and Jewel Music Publishing Co. E1361

ASCAP Exhibit No. 207—Contract dated July 26, 1965, between 3M and Joy Music, Inc. E1371

ASCAP Exhibit No. 208—Contract dated October 1, 1965, between 3M and International Korwin Corp. E1379

ASCAP Exhibit No. 209—Contract dated March 1, 1965, between 3M and Leeds Music Corp. E1390

ASCAP Exhibit No. 210—Contract dated March 15, 1966, between 3M and Mills Music Inc. E1400

ASCAP Exhibit No. 211—Contract dated March 15, 1966, between 3M and Pic Corporation E1412

ASCAP Exhibit No. 212—Contract dated August 3, 1966, between 3M and Ray Music Co. E1423

ASCAP Exhibit No. 213—Contract dated September 1, 1965, between 3M and Ross-Jungnickel Music Inc. E1432

ASCAP Exhibit No. 214—Contract dated September 7, 1966, between 3M and St. Nicholas Music Inc. E1446

ASCAP Exhibit No. 215—Contract dated February 21, 1966, between 3M and Sam Fox Publishing Co. E1458

PAGE

ASCAP Exhibit No. 216—Contract dated September 1, 1965, between 3M and Southern Music Publishing Co. E1471

ASCAP Exhibit No. 217—Contract dated January 25, 1965, between 3M and Shapiro, Bernstein & Co., Inc. E1486

ASCAP Exhibit No. 219—Contract dated October 1, 1965, between 3M and Laurel Music Corp. E1496

ASCAP Exhibit No. 222—Contract dated April 2, 1965, between 3M and Hi-Ti Music Corp. E1507

ASCAP Exhibit No. 223—Contract dated November 5, 1965, between 3M and Milene Music, Inc. E1517

ASCAP Exhibit No. 290—Agreement dated as of 7/1/67 between CLGA and Producers E1529

ASCAP Exhibit No. 326—Gitter Affidavit dated 6/17/74 in this action E1563

BMI Exhibit No. 114—BMI Consent Decree dated December 29, 1966 ..... E1568

BMI Exhibit No. 166—Letter from Edward Cramer to CBS dated October 29, 1969 ..... E1579

THE COURT: Are there objections to them?

MR. COLLINS: BMI objects on the ground that it is not admissible against them and they are irrelevant.

THE COURT: Well, it would seem to me they would not be admissible against BMI, but I believe they might be relevant as far as ASCAP is concerned and I will admit them against ASCAP.

(Exhibits PX419, 420, 463 and 464, respectively were received in evidence.)

MR. COLLINS: And they are received in evidence.

THE COURT: On that basis.

What arrangements will you be making to mark these after my rulings have been made?

MR. COLLINS: We will present them to the clerk.

I next offer PX424 and PX425. These are AS answers to interrogatories which set forth the informat as to their total receipts and distributions for the years 1960 to 1969.

ASCAP has no objection, BMI objects on the grounds that they are not admissible and that they are irrelevant.

THE COURT: I can't conceive that they are admissible against BMI and they are admitted as far as

ASCAP is concerned.

(Exhibits PX424 and 425 received.)

MR. COLLINS: The next two documents I offer in evidence are PX530 and PX58.

PX530 is ASCAP's financial statement for the year ended December 31, 1970, the other is ASCAP's financial statement for the year ended December 31, 1971.

ASCAP wants confidential treatment for these documents and BMI has the objections of irrelevance and not admissible against them and in the case of these documents, again I think they are basic background material and they are the financial statements which are distributed to every ASCAP member and a covering letter on top of each of these financial statements shows that.

We have in the stipulation the same documents for prior years, not subject to confidentiality and Mr. Marks was shown the most recent one during his testimony on the stand.

MR. TOPKIS: If I may interrupt, you can put in any of them not confidentially.

MR. COLLINS: Are they received, your Honor?

THE COURT: With pleasure.

MISS KEARSE: But not against BMI.

THE COURT: No, not against BMI.

(PX530 and 58 received.)

MR. COLLINS: The next is PX532. These are ASCAP's monthly financial statements for the years 1965 through June 1972.

THE COURT: Why do we need those?

MR. COLLINS: I think these are materials which contain a better breakdown than you get in the overall financial statement and there is informationin there on the cost of the particular parts of the survey.

THE COURT: Any problems on them other than Miss Kearse's usual position?

MR. COLLINS: No. Subject to the protective order and not admissible against BMI.

MR. TOPKIS: As to that we do want confidential treatment.

THE COURT: All right. Admitted, subject to a protective order and not as against BMI.

(PX532 received.)

MR. COLLINS: The next exhibit is PX455, a computer printout listing in alphabetical order songs first performed, and this is a BMI document, in the years 1968 to 1971, and the first six months of 1972.

I will offer at the same time PX456, which are

jbb-4

titles submitted by BMI affiliates in the years 1970-1972 for various quarters of those years. Again I offer these on the scope of the new music problem.

THE COURT: These are BMI documents, is that right?

MR. COLLINS: Yes.

THE COURT: I guess Miss Kearse really objects to these.

MISS KEARSE: Yes, I object to these, your Honor, on the grounds of relevance. 455, I believe, is subject to a protective order. I just point that out. I am not objecting to it on that ground.

THE COURT: Are you looking at your letter?

MISS KEARSE: Yes, your Honor.

THE COURT: What page?

MISS KEARSE: Page 12. I believe it is the fourth item from the bottom.

THE COURT: Computer printout?

MR. COLLINS: Computer printout.

THE COURT: You say you are offering this with regard to the new music problem, so-called.

MR. COLLINS: Yes, as it relates to --

THE COURT: I obviously can't determine that

simply from your statement and from the statement of Miss Kearse in the letter here.

I will get it for what it is worth and Miss Kearse will be free to continue to argue that it is irrelevant but I will allow you to argue that it is. It is admitted.

(PX455 and 456 received.)

MR. COLLINS: PX457 is a computer printout listing the names and addresses of BMI affiliates and the titles of their works in the BMI index of compositions which have been performed.

MISS KEARSE: Same objection.

THE COURT: It is offered on which issue?

MR. COLLINS: Really, again, general basic background information, being able to select an individual and look at the number of compositions he owns and make comparisons, as to the bypass --

MISS KEARSE: You are getting mounds and mounds of stuff that is just sort of general background stuff, that is not really relevant to the issues in this case, Judge.

THE COURT: Well, it is impossible for me to agree with Miss Kearse. I believe that that is true.

In complex, economic cases of this kind, I don't know what the Court can do to protect itself unless

I want to take your time, and it would be taking your time, and this is what I have decided I will have to do, to go before a Magistrate and argue the items out a piece at a time in detail.

I really assume that the practicalities of it are going to be, there is going to be a copy of this printout in your office and a copy in your office and in a brief or an argument you are going to refer to it and Miss Kearse is going to say, it has nothing to do with the case, and I will have to decide and I don't expect my chambers to be full of boxes and boxes of these papers because I can't operate under that arrangement.

Assuming that that is the practical way in which it is worked out, I will allow the exhibit to into evidence.

(PX 457 received.)

MR. COLLINS: I offer PX435 and 436. These are exhibits to BMI answers to our interrogatories, showing officers and directors of BMI at present and officers of BMI since 1945. Again I think this is just basic background information. A lot of these things, your Honor, I think it is necessary to have in the record for making statements concerning an individual and as to his position, identification.

THE COURT: All right. It is admitted.

(PX435 and 436 received.)

THE COURT: I must say, and I should express myself here, I think the basic background is all very well but, you know, what we are all going to be really interested in here is the extent to which your proposal is feasible. I mean, who was the president of BMI at an earlier date I don't think is going to have very much effect on the outcome of the case.

MR. COLLINS: I think we do need the identification information in.

THE COURT: Well, if this particular person is significant in the case,I would like to knowhis nam yes.

MR. COLLINS: I offer into evidence PX437 & 438, which are BMI forms of single station license agreements, (1), the blanket license agreement and the other the per program license agreement.

ASCAP objects on the ground that they are irrelevant.

MR. TOPKIS: I will withdraw it.

THE COURT: That it is not binding on you or what? What is the relevance?

MR. TOPKIS: I don't think I made any such objection.

MISS KEARSE: We certainly object on that ground.

MR. COLLINS: I am sorry. ASCAP does not object. BMI objects on the ground of relevance.

MISS KEARSE: This is a network case and these are station licenses.

THE COURT: What isyour claim as to the station licenses on the network case?

MR. COLLINS: I think the single station per program license, while I concede that it is not relevant to the issue of bypass because of the stipulation, I think that it is relevant. For example, we have heard in this case from BMI why didn't you attempt to get the direct licenses in 1970.

I think the form of per program license they issued, as to whether they could try that, and we ought to have the kind of per program license issued in the past.

THE COURT: You mean you wouldn't have wanted that kind of per program license and that you will argue that if that is what they gave the station, that is what they are likely to have given the network?

MISS KEARSE: We have never had a form of per program license for a network.

MR. COLLINS: No, but you have had a form --

THE COURT: I think it is of little probative weight, but I will allow you to argue from it. I will admit it.

(PX437 and 438 received.)

MR. COLLINS: I offer PX440, 439. These are the BMI licenses with NBC and ABC. I offer them in evidence. BMI objects on the ground that they are irrelevant. Again, your Honor, I just think there is no reason not to put in this record forms of license agreements of all three networks, so you can have the history of those licenses in the record.

THE COURT: I assume your position is the same as it was, Miss Kearse?

MISS KEARSE: Yes, obviously, your Honor. They are just not relevant to anything in this lawsuit.

THE COURT: My ruling is somewhat in disagreement with you both. I am admitting them in evidence.

(PX439 and 440 received.)

MR. COLLINS: PX529, I offer in evidence. It is a letter from CBS, applying under protest for a license pursuant to Section 8 of the BMI consent decree. This is really a document just to have the background, the context in which the lawsuit arose.

jbb-10

THE COURT: I want to know the history of the parties' relations with each other and I will admit it.

(PX529 received.)

THE COURT: Are you coming to the end of a list?

MR. COLLINS: I am at the end of a list.

THE COURT: I wanted to make this suggestion. I notice one of your witnesses arrived and I don't like to keep t[illegible]iting. I want to suggest that either we hear him now and get back to this later on, when there is a suitable break or I would prefer what I am about to say:

I had planned to hold a hearing on Friday [illegible]ich has now broken and I would be prepared to spend a cou[illegible]e of hours on Friday going over this, so we can keep going with the testimony, which I am very much concerned about, and this is the kind of material which I think can be done outside of trial time and I hate to take trial time to it.

Is that agreeable?

MR. HRUSKA: It is certainly agreeable.

THE COURT: I don't know that you all have to be here. As far as I am concerned, you don't all have to be here. Just those who really have a working knowledge of the documents. Maybe that is all of you.

Then later in the day we will discuss what time on Friday.

MISS KEARSE: MayI make one comment with respect to the last document offers, PX529?

Is that it?

MR. COLLINS: It was received.

THE COURT: You may make the statement.

MISS KEARSE: This is a document of CBS and I have no objection to it, if it is offered solely for the purpose of showing that this document was sent.

I object to it for the truth of anything stated in it.

THE COURT: Remind me. What is the document?

MR. COLLINS: It is a letter from CBS applying under protest for a license.

THE COURT: Certainly it is not admissible for the truth of its content. It is admissible to prove that CBS took that position as indicated in the letter.

Allright, let's take a short break and then we will go ahead.

(Recess.)

MR. TOPKIS: Mr. Michael Dann.

M I C H A E L D A N N, called as a witness on behalf of ASCAP, having been first duly sworn, was examined and testified as follows:

THE COURT: Ladies and gentlemen, I think I have already toldyou that I have known Mr. Dann over a period of years and we have been fairly close personal friends. I may believe what he has to say, in any event, Mr. Hruska. I thought I should make the statement for the record.

DIRECT EXAMINATION

BY MR. TOPKIS:

Q Mr. Dann, if I may read from an entry in Who, correct me if there are any misstatements in it, will you please.

You were born in Detroit in 1921, you went to work as a comedy writer in 1946, you jointed the public relations staff of the New Haven Railroad in '47, you were trade editor of the press department at NBC, that is the National Broadcasting Company network?

A National Broadcasting Company.

Q National Broadcasting Company 1948 to '49, ordinator of program package sales from '49 to '50. Wh is that network?

A Yes, television network.

Q Television network. Superintendent of special telecasts from '50 to '52, manager of -

A Supervisor.

Q Supervisor. I beg your pardon,sir.

Manager of TV program department from '52 to '54, director of program sales from '54 to '56. Vice-president of TV program sales from '56 to '68, vice-president network programming New York,CBS TV from '58 to '63, vice-president programs CBS TV from '63 to '66, and senior vice-president CBS from 1966 to 1970.

Is that correct, sir?

A Yes.

Q Would you tell us, please, what your responsibilitys were as senior vice-president programming from 1966 to 1970?

A The executive in charge of the CBS television network program department was responsible for the planning, scheduling, development of all programming on the CBS television network not covered by the news and public affairs division.

This would mean that 90-plus per cent of all programming on the air as far as network programming was concerned was under my administration. This does not mean that I would have final authority as to the selection and

scheduling of the network programming that went on the air. It meant that I made the recommendations to the management who at various points exerted more or less strength in determining what was to be seen.

However, the final authority rested with the management of CTN as far as programming was concerned.

Q To whom did you report, sir?

A I reported to the president of the network.

Q Who was?

A Well, we had some changes during that time, but I think it was -- it was James T.Aubrey, Jack -- John Snyder, Thomas Dawson, Robert Wood.

Q But yours was the day-to-day task of selecting programs?

A Yes.

Q Mr. Dann, somewhere or other I have seen it suggested that you have bought and scheduled more programs in the history of television broadcasting than anyone else. Is that an accurate statement so far as you know?

MR. HRUSKA: I object to the question, your Honor.

THE COURT: Why?

MR. HRUSKA: Because I don't believe that Mr. Dann or anybody can really know the answer to that question.

THE COURT: If Mr. Dann doesn't know the answer, he can say so.

A I would think if there is somebody who has brought more programming -- if you assume that the had of a program network or the head of a -- or a person in a program function has the authority to buy -- certainly let me correct you. I have made recommendations to buy more network programming probably thananybody I know about simply because I have been around longer I would think, not because I was more powerful or anything in that post.

Q Do I gather, Mr. Dann, that you were responsible for recommending the broadcasting of Death of a Salesman, Sir John Gielgud, Ages of Man, Hal Holbrook's Mark Twain, The Royal Shakespeare production of Midsummer Night's Dream and, not to stay on too high a level, the Beverly Hillbillies?

A I recommended those specials. I did not recommend the Beverly Hillbillies. The Beverly Hillbillies was -- came ninto being under the president that I was working for, and had no real development work in that area because at the time the Beverly Hillbillies was a West Coast operation and I was in charge of the East Coast.

Q We will leave to oblivion the name of the man around whose neck that would be on.

Mr. Dann, you left CBS in 1970?

A I did.

Q Voluntarily or involuntarily?

A I notified the management roughly one year prior to my departure that I would like at that time -- at [illegible] time I notified one of the senior officers of the corporation who would be involved insuch a decision,that I would not be anxious to remain, and it was the president of the Columbia Broadcasting System and it was a year prior.

He said he would make every effort to find something else for me. It didn't work out as much as people tried to find something in the corporation,and in early June I notified the president of the corporation and the chairman of the board that I was going to take another job.

The chairman of the board was kind enough at that time to suggest that he had another possibility for me and I had already made a commitment and accepted it.

Q You left to become vice-president of Childrens Television Workshop?

A I did.

Q Just to sum it up simply, I take it your departure fromCBS was wholly amicable?

A Very.

Q And you hold CBS and particularly its television

network in the highest regard?

A Totally.

Q You became vice-president of Childrens Television Workshop.

Did you continue in that capacity?

A No, I changed my status at the Workshop [illegible] years ago to become a consultant because I wanted to broaden the base ofmy activities. At that time I assumed a teaching post at Yale University, which I still hold, and I lecture at various universities. In addition, I have become a consultant to some corporations on a regular basis.

Q You are then today a lecturer, a university fellow and a consultant?

A I am.

Q Have you on occasion had any Government employment?

A No, not since I worked for the post office as a child.

Q Mr. Dann, you have been in television then from just about since its active commercial inception at the start of 1950, right?

A I really started my activities to some degree in television in 1948, '49 whenI joined NBC in the press department.

Q Back in 1950 or thereabouts, Mr. Dann, do I gather -- I will ask the question wholly open-ended. Would you briefly trace for us the history of network television programming from 1950 to today focusing, of course, on the major changes that have taken place.

A May I ask when you say the history, are you talking about control, content, program cycles? The question seems a little broad for me.

Q I was trying not to lead you out of deference to my friends. I will offer a couple of hints.

I understand that there was a time when most television broadcast programming was live?

A If you want --

THE COURT: I think, Mr. Topkis, we needn't be to fussy about the question of leading when we are dealing in as broad a subject as this. If you want to specify the categories of information you would like Mr. Dann to commer on, I am sure nobody is going to object. If theydo, I would overrule them.

MR. HRUSKA: That will assure your Honor that no one will object.

A Taking that first, television like early radio, and radio for many years was entirely live, that while in

the very early days of television there were cinescopes. Cinescopes were such quality that only those people who normally looked at cinescopes and had no other access to programming would see it. Essentially those in the major markets looked at it live. As more of the United States became interconnected, which finally was the linking ... coaxial cable, we essentially had what we called live programming except for film programming.

Now, most of the programming at the start or practically all of the programming that New Yorkers saw originated in New York or Chicago and all of that was live.

It was essentially then a live form because of the limitation -- first of all, the industry grew up live, imitating the radio industry which was essentially a live programming venture, and you must remember that the people in television essentially came from radio at the start particularly in New York. That was not true in Hollywood. At the start of the programming industry in Hollywood, the industry essentially came from the motion picture industry. Good or bad, that is where they came from. They worked on film. Since the only exposure on the network in the early schedules that was recorded with Hollywood, not even feature

films on network programming because there were no feature films in the early days of network programming. That breakthrough came much later.

What we had in the entire fifties were essentially live programming and as cinescope qualities increased, there was seen some cinescope. The only early departure from this which was largely out of the Desilu-Danny Thomas form was that Desilu and Danny Thomas, and I think there were a few other situation comedies, were recorded on certain kinds of 3-camera technique that were put out over the air.

They were not film. They were, I guess -- I am not an engineer. It is a version somewhere between film and cinescope, I think. Certainly it is a high quality cinescope. It certainly wasn't film in the traditional sense. That cycle was really very clear and pronounced. After all, New York was the hub of television programming. Perhaps that is why the television program headquarters for all the networks werein New York, situated physically. You could say that is because they wanted to be close to the home office. That wasn't true in the motion picture industry. The motion picture industry production on the West Coast, the East Coast was administration. That was quite the contrary.

There was a vice-president, for example, on the East Coast at CBS and NBC. CBS, just from having worked with both companies in similar capacities, was much better structured to handle programming; perhaps why they always maintained a leadership position and still do.

They did in the early days confine themselves to the programming schedule to a heavy live schedule and making up the figures. I would think that it wasn't more than 20 or 25 per cent maximum on film, probably closer to 15 per cent on film, and particularly counting the news shows, it would be 10 per cent on film. Everything else was live.

As the industry moved west, and it isn't I think important this morning perhaps to go into that unless somebody wants to, why the industry moved west, but as it moved west as far as production was concerned, it essentially lost the dynamics of live television except for football games and superbowls, but things like Uncle Miltie's Hour on the Armstrong Circle Theatre and Studio I, and the great bulwark of live programming that originated in New York started to die so much so that as the trend continued and the cycle continued towards film programming, one barometer of the influence of Hollywood is to tell you that I don't know today of a single program made in New York,

live, tape, film or jumping out the window. It just doesn't happen in the liquidation of television studios except for the daytime soap operas, there has been a massive activity on the part of the networks which were stuck with considerable facilities and had to get rid of them. They are now very limited compared to what they were.

On the other hand, there has been a slight rebirth of tape programming which we can refer to as live programming in one sense -- I don'tknow if you want to, but live on tape in the sense it happens before an audience and this can be instantly replayed if they want to, with the birth of All In The Family, which was taken from the BBC Show, until Death Do Us Part, Yorkin and Lear gave a rebirth to live programming and they started All In The Family, and then Sanford & Son, I understand Maude, which was all recorded in network studios on tape. While I think that fad or that cycle will be very short-lived because they are based on a certain premise, I don't think that there will be a decrease in the extraordinary amount of film programming until other pressures are brought to bear. I think that in brief is a synthesis of what happened in the live versus tape and film industry.

Q Very well.

How about the variety of programming, Mr. Dann? Are there as many sources of programs today as there were 20 years ago, let us say?

A No.

Q Are there more or less?

A No, there has been--if we can use as a--some sort of a benchmark the way I speak the fact that there has been a drastic decline in the number of studio facilities in New York as compared to the West Coast or programming, the drop in the number of suppliers from the early days to the relative handful today has--I'm sure is--there are other industries that have shown--the number of automobiles, for example, that were available 40 or 50 years ago is nothing compared to the number of suppliers, the number of suppliers that actually functioned and made pilots.

If we could define suppliers, and I don't know of any other way to do it except to say those who come in with programming. Then you say to yourself, what you mean by those who come up with programming?

I really think it would be simplier if you define suppliers of those either who brought in a pilot by themselves or with the network or on some basis. When you look back to the fifties, there were literally hundreds of pilots made.

Q What do you mean by a pilot?

A A pilot is a program that is planned and conceived with the end result that when this particular film, tape or recorded run through of some kind, even on a kinescope, which they often did in the early days, it was made for the management and the program departments of the network to evaluate as to whether or not it should be put in the schedule, which would really mean to evaluate on the basis of its property. Its circulation success or its quality or its attempt to give balance to the schedule.

Q That is to say it would be an example of what was proposed as a continuing series?

A Correct.

Q Did I gather you to say that back in the fifties there were a great many of these pilots prepared annually?

A Yes, but I'm saying there to indicate there were a great many--your question was were there a great many suppliers.

There were literally hundreds and there were hundreds of pilots made by these suppliers that had nothing to do with anybody financing them very often except the individuals themselves. They would often bring in a pilot out of the blue. I don't say their batting average was great compared to a pilot that you knew was coming from producer

but as a programmer, I remember in the early fifties, in the mid-fifties, later on in the sixties, very often seeing a program that I didn't even know was being made and I had a very good understanding of what was going on in the industry.

It often came in from people I didn't know were involved. It would be impossible to believe today because there are so few suppliers that that would happen. I think that as far as production companies in television today, if you asked the editor of Variety or any executive in a program department and they have to--their business and livelihood depends upon their having their fingertips on every production company--the best example is to look on the credits on a television network today and you will find that roughly four or--I would say cautiously that ten companies essentially provide the programming on the air.

Now, there are some examples of independents who have come to the fore during the past five or six years, but they are very short-lived as compared to a Filmways or a Four-Star Production or even a United Artist.

There's a great reservation, for example, and I have talked to the heads of the motion picture companies, four of the six majors in the last month because they have discussed the problem with me on a very personal basis as to their question of survival.

I think there is a reasonable chance that some of the major production companies now in television will not continue because the economics don't justify it, and I think that you can--you can predict that the production companies involved in the making of television programming will continue to decrease as they have steadily since the inception of television.

They went from a maximum now to a minimum and that just is one of the tragedies that's happened to programming, when the networks themselves could not be more actively involved in making of their own product because they are just going to run--well, they would have a better selection if they were able to be more active in programming, the creation of programming.

Q Why aren't they?

A I think they are active, but I think--I have always felt that since--it's been my assumption that they're anxious to stimulate, but when the Government wasn't quite as concerned about giving everybody a fair chance to make programming through all sorts of pressures and some laws, that the program departments I think were more excited about creating a show like Gunsmoke or--I can't remember going back to shows even like Hawaii Five-O and some of those programs that CBS really inspired and created in the shop.

I can't believe there's quite that creative stimulous anymore. I think the program departments have had to be pressured a little towards their own creative instincts.

Q Has there been a trend from--I will preface what I say by saying there has been testimony here that the only program on CBS today that CBS produces other than the news shows is Gunsmoke.

Is that a typical industry-wide trend?

A I would think so.

Q Once upon a time the networks were far more actively engaged in program preparation?

A Oh, yes.

Q Has there been a change--

A Excuse me, along with that I question very much as to how much any network will put anymore money in plant capacity. I mean, they will pull away from the active role of making their own films. Incidentally, this tren is not typical only to television. It is true of the mov. industrie where you wouldn't merely go on movie lots. First of all, I don't know if they have a movie lot in some companies.

Second of all, they don't have big casting ' rtments or casting calls. If you are a young starlet or writer

or director and you came to Hollywood today, you would be hard put who you would even meet. That existed under Louie B. Mayer or under Adolph Zuckor or the people who built the motion picture industry.

I don't think that is as true as network television at all. The network program executive and the management assume great responsibility for everything they do. They are terribly concerned. Mypoint was that as far as the individual effort of creation, I think that is less.

Q Are there as many other shows appearing on the air this year, new shows that is appearing on the air each year today as there were say 20 years ago or has there been trend in that area?

A I haven't studied that particular question too closely, but I must assume that the ratio--you have to go by cycles.

At the very beginning they didn't have schedules. I'm going back into the early sixties. I would think there was the same attrition today on programming as there has been. If there is a variance, you could run into one year where you had a lot of good shows come on or one year where you had a lot of bad shows. I mean, I'm sure any curve would not be consistent because some years you come up with all failures and some years you come up with hits. It is a

creative industry and nobody knows what is going to happen.

Q Going back again to the early days and contrasting with today, has there been any change in the way in which programs are financed?

A Yes, there's a substantial way. The economics of early television were such that it was--it was not common to have the majors or any healthy company ask the networks for any money for financing.

They as a rule have often brought in a completed pilot.

THE COURT: You are talking about producers, programmers?

THE WITNESS: I am talking about people--suppliers who brought in a pilot. Essentially a producer unless he was like Danny Thomas or Sheldon Leonard, who had great ins with companies like General Foods where they were able to supply them substantial hit programming, they might have financed their own pilots as individuals, but don't forget, even then in the fifties a pilot to make would certainly cost 40 or 50,000 for a half hour, an hour would cost 75,000. Today it costs a couple of hundred thousand dollars to make a half hour pilot and it would cost--when I left it was costing us half a million dollars to make an hour pilot.

That kind of money is so substantial that it would

take a very rich show business type individual to want to put up that much money without a big company behind it.

But, on the other hand, when Screen Gems made six or seven or in those days they would make say a dozen pilots, they knew automatically just on the basis of hits and misses, and if they didn't they would fire the program head at Screen Gems. They knew out of 12 pilots, they would sell three and since Screen Gems, a Division of Columbia Pictures was a highly successful company, when they made 12 pilots on a budget of $800 and they sold three or four, believe me, that developing cost was ammortized over the series that were sold as part of an operating expense. FA and D spends that would be an internal functioning thing for any industry.

Now, the people who made these pilots were--there were approximately 25 to 30 production companies that made programming pilots for the network, 30.

Now, that's a lot as compared to now because when you take one production company away, it is a terrible blow to a television program--network program executive, because that's one less chance to get a hit, which you really try for all the time, either a quality or circulation hit, but that number of production companies approximately were, off and on, in the area 25 to 30 during the maximum period and as far as people who were involved in making pilots, as producers who in some way got either financing some, and part, I am sure from the network, although we didn't like to do it in the early days, give money and then give up, lose ownership, I think we--that wasn't a decision.

We just went in that business.

We had on our staff producers who made pilots for us, any number. CBS always was so dedicated to its programming schedule that you always hired the best producers in the industry to come and work for you because you wanted the best programming and they made pilots for you that they had no equity in necessarily but most of all they were under the control of the network and financed by the network.

Theonly deviation from that was under the star

system when you made a commitment to a Red Skelton, a Gleason, even a Kaye or a Garland, later on. You didn't make a pilot normally for a star. For a star you made a commitment because you knew that Danny Kaye wasn't going to do dramatic roles of a serious nature and you knew that Judy Garland would sing some. Then you made a commitment to them as individuals.

Q Staying with the pilots, then, do I gather that predominantly they were financed by the program producers themselves, rather than by the networks, although the networks themselves did some?

A Our program budgets at CBS in those years, if CBS, which was always the leader and spent more on programming than anybody else, considerably more, if they spent--if they were responsible for one-third of the program development budgets, I would say that the networks roughly put up half the money for program development in pilots and the industry put up the other half.

THE COURT: What period are you talking about now? The fifties?

A Iwould say it was that way during the fifties and continued towards the early sixties.

Today I would say, with the small number of production companies, and we will get into this phenomena,

I would say that the networks today put up 90 per cent of the money for the development of pilots.

Q Has there been an increase or a reduction in the number of pilots?

A There has been a dramatic drop in the number of pilots, as you define them in the old way.

In the old way, they used to make, for example, 40 or 50 situation comedies, maybe 60.

Today the three networks may make 15 or 18.

In the old days, we would make an hour pilot for a dramatic show or a half hour pilot for a dramatic show. I mean everybody made a lot of half-hour pilots for dramatic shows. There are no half-hour dramatic pilots made now because there are no half-hour dramatic shows at all.

Then what happened was the cost became so exhorbitant in doing the story form pilots, a half a million, and if you had to make, as I did, often make six or eight hour-pilots, that would be five or $6,000,000--$5,000,000 in development just for the hour story form, which was, you know, a dreadful cost, and as I was starting to leave--I think Hawaii Five-O was my first example, some very intelligent people, not myself, at Universal, convinced NBC that they should make the longer story forms as pilots and call them Movies of the Week, feature, something that annotated

that it wasn't a pilot.

I mean, nobody at NBC announced "See our new pilot series next year." I mean they said, you know, "see Universal and NBC's joint production of this fantastic series of new films."

But, in it they took all sorts of films that they had in development and then they could get six or seven hundred thousand dollars, maybe $750,000 for two runs of a pilot.

Now, $750,000 paid by a television network to Universal for the pilot helped defray to a large extent the terrible development costs and give the networks a very intelligent basis to evaluate programming that was going on the air in the scheduling by having a performance first in one of these quote movie of the week series and the movie of the week series, which is now the home of all pilots done in the story form, not some but all because it is the networks that are under such pressure to create the long forms and it is so tough that they are quite anxious to let anybody make a story, whether it is a pilot or not, as long as it is functional.

And I've talked to most people in the industry and I have said to them, Jerry or Ted or somebody, "It is a pilot", and they say, "I don't know if it is a pilot; could

be a pilot, if it works," you know, and if it doesn't work, it was a nice feature.

You don't have to label it a pilot beforehand but you might say to somebody, you know, Patty Duke is in something, we have got a start. I mean, very often, motion picture companies, if they are not what we call number ones, which are major stars, but, you know, people who are happy to be working every week, they will make a contract with them at the time the feature film is made that in the event the network orders this for series, the following performance, performers, director, producer, are available for series for a sustained period.

THE COURT: What's the basic reason for the terrible increase in cost? Of course costs have risen in general for everything but I gather not to anything like the extent of the cost of production.

Is it the elaborateness of the productions?

A Well, that's--you unfortunately got to the most exciting point I would like to make at the beginning.

THE COURT: Maybe you told me that oncein the past.

THE WITNESS: I don't know, but we are going to work downhill from that, Judge, because as television became more adult and got out of the--don't forget, the people at

the start in television films, and today it is mostly a film industry, with the "B" film makers and the "C" film makers.

Now, you know how dreadful Hollywood films were in the sense of quality, so if we got the "B" and "C" film makers making Fireside Theatre or the Schlitz Playhouse in the early fifties, they wouldn't stand up very well in the archives of the modern museum.

Now, what happened was, television started to create and train very able young men. I mean it was the Arthur Penns and the George Royhills and the Frankenheimers and the Norman Jewisons and as the industry became much more sophisticated, in the early days, in 1950, you could say, oh, that's a television film.

I mean I don't care if it is a half hour, hour and a half in length, you can say that was made for television.

Today you can't.

Today they spend so much money and are so sophisticated that many feature films, when you consider it, they have spent $750,000 for an hour and a half or two hour film in television, that's what many, many motion picture budgets are. It certainly is in Europe.

The sophistication, they reshoot, go on location, they are very careful and they have become dangerous in the

sense that they become very expert, as expert as many of the people in the motion picture industry.

Second of all, the terrible crunch about the Union problem where they think the networks can pay anything and in the end they know the networks have to have programming so that many of the craft unions have accelerated at the maximum rather than the minimum, and, remember, like all show business industries, there are, you know, 105,000 unions and, lastly, the normal calculations of the industry as far as raw products and everything else, but those three factors.

The fact two factors are the most serious ones, of course.

THE COURT: Thank you.

Q Mr. Dann, there has been testimony here that there are on CBS television today two variety shows per week, the names of which escape me.

Was there--

A Carol Burnett and Sonny and Cher.

Q Thank you sir.

Was there once a time when variety shows featured more prominently in the program schedules of television networks?

A Yes, the live variety form is dying, for two reasons: The industry essentially is moving away from the

live form for natural reasons and I think economic reasons and, second of all, you must realize that the great stars of television were really the great stars of radio, were really the great stars of the clubs, were really the stars of the Mountains and that if we go back far enough, the development . individual variety talent--I happened to look at the Milton Berle Show, the Friars' Roast of Milton Berle last night from 9 until 10 as I was preparing for today and watching just the set, and I looked at the whole roster of people on that--it was Lucy Ball and Jack Benny and all of them--they were all up there, everybody in show business was there, Frank Sinatra, all those people and you realized that they had all come from the clubs and burlesque and the mountains and that essentially the night clubs have died.

The mountains are no longer what they were and as of today even harder to get to and the vaudeville houses are closed and the only entertainment comes from what we call the coffee house monology form, people who work the coffee houses in the monology and do, mainly, social satire. That's nothing wrong, because Will Rogers did that. Certainly the Smouthers Brothers did that.

But essentially today, when you realize that it costs an advertiser--the advertising community, for 52 weeks

a year one hour of variety, somewhere between 10 and $12,000,000--now, if that 10 or $12,000,000 figure holds, doesn't even go up, it would be very dangerous for a network to schedule a performer unless they thought he was a great, had a real chance of success.

You see, back in the early days ewe would put on Wallie Cox in the summer, for example, in Mr. Peepers and he turned out to work well enough and you kept him and put him on in January.

You took George Gobel's show and it worked in the summer, so you put him on in the fall or in the January time.

But we don't even -- we have two problems -- one, the shortage of supply is increasing because the roots of variety entertainment, the roots are dying. I was worrying about "is" dying, but they are dying and, second of all, the development of programming from the variety performers on the air is severely limited because the number of live shows are starting to go down so that even when you had a Steve Allen kind of hour variety show, where Don Knotts and Louis Nye and all these guys came from, or even Tommie Smothers -- six or seven years ago you had Glen Campbell, the little fellow who ran for president, the comic, I don't remember him -- there was a comic on the show.

But at any rate --

Q You couldn't possibly mean Dick Gregory?

A No, he was, he had big popeyes, but at any rate he was a comic who eventually got his own situation comedy.

The variety shows can create new variety shows, but first of all you have to have the variety stars.

But that can't be the sole source of new variety programming.

What has happened has been that, I don't think CBS for example put on any new variety shows this year, and Sonny & Cher, which really went on the air, I think, in the summer, was considered just to be a summer replacement. I may have been there. I don't remember. But I think that -- I know it was considered to be a big gamble but since then, when you have a 10 or 12 million dollar nut to crack, you have to be awfully sure that you can survive.

Now, the one place -- so you have to have a good star and that is one of the reasons it is declining.

On the other hand, live programming is very functional come February because you go out and you buy a program that is very cheap and it is -- if you have ever seen the program, I don't know the list of variety shows that will go on this year but -- this January or February -- but they will not be of great substance.

We put on Hee-Haw, I think, in January or February. They are of secondary role in January or February, they are not important. They are bookkeep to

get through the period because a film show -- you see, a film show takes six months or a year to ready. You don't know whether it is a failure.

If you had asked me, well, shouldn't they always have a show ready to go into, so why would they order film shows ahead of time, instead of putting cheap varieties, they don't know what they are going into. And they have to be careful about what program replaces what program. There has to be scheduling balance and audience.

The variety shows on the networks today may be at a maximum. That doesn't mean that the public won't become so surfeited with tape or film in the traditional sense, I mean drama, let's say, or situation comedy, but I don't think there is any reason that people will look at a second rate comic just because there are no other comics on the air in the variety form.

I think people will always be as particular and for that reason, we have seen this very sharp decline. There used to be two variety, three variety shows on a night sometimes.

After all, I can remember a schedule on NBC Saturday night alone where we programmed variety from 7:30 to 11:00, all live. Went for years like that, but not many

any more.

Q Now to Sid Ceasar you have to go to the Globe movie house.

A That's right.

Q I am told, by the way, that the small comic who ran for president was Pat Paulson.

A It was. I apologize.

Q No need to.

You spoke of these variety shows as being live. They are actually taped, aren't they?

A They are all taped, oh, yes. Variety shows now could be made months ahead of time. It is very rare, it would be an accident or a sickness that would have you air a variety show less than three weeks separation from air date.

I would think many shows are made months ahead of time

Q In the earlier days, 10, 15 years ago, when a series began to run, a situation comedy, a dramatic series, whatever, in September at the annual start of the season, it would run for 39 weeks or 52 weeks?

A The normal pattern -- there were some people at the beginning who did not allow any repeats, no repeats.

Q So that you would run straight through the year

with 52 now shows?

A You would run 39 and be replaced by a program that the start of the 39 weeks would provide. They often -- I wouldn't say they controlled the time period but certainly they had an interest in maintaining their success in that time period so, quote, so they often programmed the summer and we started off with no repeats and then we went to, on the film shows, 39 and 13, and then we went to --

Q What do you mean by 39 and 13?

A 39 new and 13 repeat, assuming it was 52 weeks, with a few preemptions in it.

And then we went to -- there was a slow attrition that developed so that when I left the company, I know that we were arguing in some cases, because the Program Department always wanted more new shows, as they should have, and theBusiness Affairs Department always wanted more repeats because they wanted to control their costs and there is that natural difference between he Program People who want to spend whatever they would like and the Business people who said you can't spend it.

But I can remember the last discussion I had with the vice-president in the charge of Business Affairs, and I think it was Donald Sipes at the time, who -- we talked

about 22 new and 24 repeat.

Q Out of 46 weeks with six preemptions or something like that?

A Pardon me?

Q That adds up to 46?

A That is correct, but they put specials in to fill it out.

I mean, now it is not uncommon on the original run to have the technical possibility of more repeats than new.

There has been a very sharp decline and I think this was strengthened -- I remember I argued for many years that the public was being -- well, I argued perhaps selfishly, that it would be better for the public if there were more new because they won't look at the other and the Research Department was never able to prove my point of view at all, that the ratings held up substantially well, unfortunately, with repeats and it was a sort of great discomfort for me and joy to the Business Department to have their position over the years maintained and so that we have had a roaming repeat schedule that does not seem to be a deterrent to viewing.

THE COURT: Well, could it be that the people who watch Channel 4 during the winter watch Channel 2 during

the summer and so on?

A That is what the Business Affairs people and the Research say. You have, besides a loyal audience, a different audience, because you must realize that the people don't look at a program every week. They look at it very often two out of four. I think there is someone in the room who would be more of an expert on this than I am, but I think that in a soap opera, where they talk about great loyalty, women very often on an average don't look any more than three out of five times,so when you get to the nighttime,either from competitive programming or somebody has the measles or a wedding or something, or just a movie, or they have gone to sleep early, whatever it is, the viewing patterns are such that people, Judge, don't look at any program every week and that is the best, most logical reason.

The other reason is, half the people, I think, forget that they saw it the first time.

Q So that the result has been that in the tugging between the Business Affairs people for more new shows and the Programming people for more new shows, the business people have won out?

THE COURT: Well, to the extent indicated.

A To the extent that they have continued to drop, yes.

Q Now --

A Excuse me. Let me add parentheticallythat some of the new forms developing in network television require tremendous efforts from stars and under the star system, very often they simply can't get stars to work more.

Like, when I had Peter Falk and"Trials of O'Brien," the distinguished English lawyer series, it was unsuccessful but Peter would work every week, he would have worked, you know, and made two series at that time.

Now, in Colombo, well, now, he is successful; they would be very happy to have him make more, but he is now a star and you know, he has to have time to dirty his raincoat or whatever it is, in that time, so that --

Q These repeats, Mr. Dann, are they broadcast only in the summer or sprinkled through the year?

A The normal tendency is to put in no repeats prior to the completion of the new cycle, to maximize the distance between your new and repeats, except during Christmas and sometimes Thanksgiving and New Year's week, where there is a feeling, both on the part of the advertisers and the

network, that the viewing may be lighter and as a consequence, that is a good place to do it.

But I know as the number of new shows decreases, I don't know if they will be able to skip New Year's week for a repeat because you may be new repeats before that on a normal pattern.

MR. TOPKIS: Your Honor, I am about to go to a new topic. Would you want to take a morning break or do you want to skip it today? I don't care.

THE COURT: I am willing to skip it. Would you like to take a break, Mr. Dann?

THE WITNESS: No.

THE COURT: All right. I think since we started a little late on the testimony anyway, we can go on.

MR. TOPKIS: Very good.

Q Mr. Dann, I would like to ask you some questions now about the music which appears on television today. Let's talk first about the shows other than the handful of variety shows. Is that music predominantly music previously created, or is it music created specifically for the program?

A I think hat is music specifically created for the program.

Q Predominantly you mean?

A Yes. All theme music is created for the program.

Q And how about background music?

A Very often usually, yes. There may be exceptions like that, like in All In The Family, or something where I think the opening song of that is quite familiar. But I think that is massive mutation to normal practice.

Q Well, actually the All in theFamily theme was written for All in theFamily, and became successful as a popular melody, isn't that right?

A I don't know that to be true.

Q You don't know one way or the other?

A I do not know one way or the other.

Q Now, how about onvariety shows, is music for such programs created for the program predominantly, or do they use music which has previously been written, standards and the like, or is there a combination of the two?

A Variety shows are quite different. I thinkthe introduction and closing of certain variety shows could be created specifically to fit the animation and everything else they are doing to tell the story of the star.

At the start. But normally the music on the variety show is music that has been written previously and selected.

Q Now down throug h the years of course CBS has been engaged in contractual negotiations with ASCAP. You were awane of that during the years you were with CBS?

A Yes, and at NBC.

Q And at NBC. Could you describe for us how,

as a program scout, you thought of ASCAP and your network relations with it?

MR. HRUSKA: I object, your Honor. It is a question which calls for an answer which if given would be irrelevant in this case.

THE COURT: I thinkthe question is somewhat unmanageable, Mr. Topkis.

MR. TOPKIS: Perhaps so,your Honor.

Q ASCAP, of course, is a clearing house in a sense, Mr. Dann. You understand my use of that term?

A I do.

Q Does network television use such clearing house functions in other contexts?

A Yes,I think that the function that I saw ASCAP performing was a massive clearing house for the music that went on the air. And I think that to me was similar to getting, I don't know if it is a good example or one that you don't like, but giving worldwide news from the AP or something. It was a service, or a functioning organization that was set up to supply us with what -- on the simplest basis -- for our needs. Our assignment was to make the programs.

MR. HRUSKA: For the record, your Honor, I would move to strike that answer. I think it is irrelevant.

There is no proper foundation for it. I don't think Mr. Dann's expertise covers the subject.

THE COURT: Overruled.

Q Mr. Dann,you were aware that CBS had a blanket license agreement with ASCAP or were you not?

A I was.

Q You were, sir?

A I was,yes.

Q Were you aware that there was a per program form of license which CBS might have sought from ASCAP, or BMI?

A I was.

Q Did you have any responsibility for participating in the decision, or for making a recommendation in connection with the decision to choose a blanket rather than a per program form of license or for that matter direct licensing.

A I did not.

Q Before this lawsuit began, Mr. Dann -- incidentally, were you advised that this lawsuit was going to be begun?

A Personally, you mean?

Q By this lawsuit, of course I mean an action entitled CBS against ASCAP, by December 31, 1969.

THE COURT: I don't know what the relevance is, but in any event are you asking whether he personally

was advised?

MR. TOPKIS: Yes.

MR. ERUSKA: I do object with regard to relevancy, your Honor.

THE COURT: What difference does it make?

MR. TOPKIS: Well, that --

THE COURT: I mean I know everything was telescoped within a few weeks anyway.

MR. TOPKIS: No, no, that is not my point. My point is that this was a decision that was made by the Business Affairs people and not by the people charged with programming. At least I believe that.

THE COURT: Well, to the extent that that may be relevant, I will allow Mr. Dann to answer.

Were you advised in advance of the bringing of this suit, that the suit would be brought? If you can recall.

THE WITNESS: I am sure I was. It is not possible I was not.

THE COURT: It is because of your firm assumption of that fact that --

THE WITNESS: Well, my office adjoined the vice-president in charge of Business Affairs and we were in

hourly contact on so many issues, that I know that I was -- the -- if the question is did I know the specific suit was going to be brought at a certain time --

THE COURT: I guess more to the point really of Mr. Topkis' inquiry, if it has relevance, is were you consulted as to whether it ought to be brought.

MR. TOPKIS: That is exactly what it is.

THE WITNESS: No, I was not consulted as to whether or not it should be brought about.

Q And if Columbia Television Network as a result of this suit, or otherwise, wound up in a situation where it was dealing directly from using performing rights with composers or publishers, or with its program producers in connection with their dealings with composers and publishers, who would have been the person at CTN responsible for such dealings?

THE COURT: The licensing music directly?

MR. TOPKIS: Yes.

MR. HRUSKA: Could I have the question read back, your Honor?

THE COURT: Yes.

(Question read.)

MR. HRUSKA: I object to the form of the question.

THE COURT: Do you understand the question?

THE WITNESS: Yes.

THE COURT: All right, I will allow him to answer. You mean a person filling what job, I take it.

MR. TOPKIS: Yes.

A The person who dealt with -- excuse me. I don't understand the question because I don't understand what kind of music we are dealing with.

THE COURT: All right.

Q All right, let's break it down. Let's take a variety show first. In the event that -- well, when the budget was made up for a variety show would you be the person at CTN who negotiated out the details of that budget with the producer of the variety show?

A No.

Q Would it have been someone under your control?

A No.

Q That would have been the responsibility of another part of CTN?

A Business Affairs Department historically deals with the agent and the business manager representing the -- the producer or the director.

Q So that you had -- that would have been Mr.

Sipes' function?

A It would be in his department.

Q Right. And the --

A But the figure paid to -- by Mr. Sipes for the whole package would usually be discussed with me, for the whole program, individual program I mean, when To[illegible] and Dickie Smothers, or Carol Burnett, or even Steve Lawrence and Edyie Gorme came in with their budget and say wanted $150,000 or $160,000, Donald, before him Sal Iannucci, and before him Spencer Harrison, would say to me, th[illegible]e guys wants $155,000, do you think it is worth it? And it would be my function to determine at what was the make o[illegible]reak point of the negotiation.

So I always -- let me put it this way: [illegible]dy ever lost a star I wanted in the history of CBS Telev[illegible]ion which I always looked upon as a great tribute to the dexterity of this business affairs department.

But at the same time if we had ever lost one performer because of a business negotiation, I think I woul[illegible] have been very upset.

Q So you would not be concerned with t[illegible] specific items in the budget but you would be concerned with the total?

A Only interested in -- I was only interested in getting the program I ordered and the producer having the flexibility and the ability to create the most successful show possible.

Q There has been testimony here, Mr. Dann, by some producers, Messrs.Wright,Vincent and Sunga. Are those names familiar to you?

A I was not aware that they were producers.

Q How would you describe them,sir?

A Unit managers, assistant producers, business managers.

Q All right. Now, those gentlemen testified collectively, I suggest to you, and if I am wrong I am sure I will be corrected, about their possible functioning under a per use system. Are you familiar with the term, a per use system?

A I am.

Q As a matter of fact, have you read their testimony?

A I have.

Q They testified that they would expect, under a per use system , that CBS would supply program producers -- and they were talking about the variety shows that they

produce -- with sufficient money to buy performance rights for music, and that on occasion when they needed extra money for a particular song or something like that they would be able to get it fromCBS. Do you recall that testimony?

A Nothing the three men I -- I remember the testimony --

Q Yes, sir.

A Is there a question to --

Q Do you agree with that or disagree?

A I disagree with it. I think that the CBS Business affairs department when it agreed upon a program price, that program price was fixed, and --

THE COURT: You mean you disagree with the extra money --

THE WITNESS: I would have to approve extra money. I would be the one under normal circumstances -- first of all, I don't think that any of these three men would ever contact CBS to ask for money. They were not the executives in charge. It would go back to the producer and the producer would go to the agent and the agent would have to come in and see somebody of rather high level to say I want to change the deal. So I think that their

testimony to me seems a little out of order to say if they needed something extra they would come back and ask somebody for it. We didn't operate like that at the network. People had to live by agreements.

Now, there were exceptions where a star insisted that he needed a superstar, or there was an accident, or we didn't like a film and had it reshot for very logical reasons, the network would very often assume financial responsibilities for programming.

Something like you are talking about just would not be dealt with -- first of all it is a small item and you must realize these -- as intelligent men that when you have a major multiple dollar deal with a company you don't come back for 500 or a thousand or five thousand or three thousand. It just isn't logical. You come back for you know as they say in the business, don't use up your welcome. I mean you come back for a very big substantial thing.

But as a regular procedure you would never come to anybody unless it was damned important.

Q So you would not expect that there would be running back and forth on Madison Avenue to get extra money for particular songs?

A I am sure the record --

MR. HRUSKA: Your Honor, I object to this line of testimony. We have had --

THE COURT: To the line of testimony?

MR. HRUSKA: Yes, sir.

THE COURT: Why?

MR. HRUSKA: And specifically this question.

THE COURT: Well, the question is perhaps a somewhat subjective characterization of what the witness earlier said. But why the line of testimony?

MR. HRUSKA: Specifically, your Honor, because the witness is being asked whether he would expect producers to come forward with requests of this nature, and whether he would expect CBS people in the Business Affairs and Program Department to honor those requests. We have had testimony regarding specific instances in which the people involved did in fact come to the Business Affairs Department, particularly in a transactional context --

THE COURT: Do you thinkthat proves it conclusively so that the defendants can't bring out testimony to the contrary?

MR. HRUSKA: No, my point,your Honor, is that testimony regarding what Mr.Dann would expect to occu is irrelevant particularly in view of the fact that we have had testimony regarding what has in fact occurre

THE COURT: Well, that may be a very good argument as to the probative value of the testimony, but it doesn't seem to me the line of questioning is irrelevant.

The objection is overruled.

Q Well, Mr. Dann, there was testimony, it is perfectly true, you doubtless recall it, on one occasion the Carol Burnett Show got an additional allowance of$25,000 so that they could go off to Australia to film a program there and help open the great new Australian opera house.

Do you recall that testimony?

A I do. Excuse me, is it proper for me to ask if that was your question?

THE COURT: No, he is just asking you whether you remember that testimony?

A Oh, yes, I do. I do.

Q Were instances such as that as rare as hens teeth or as common as human teeth?

MR. HRUSKA: I object to the form of the question.

THE COURT: Overruled.

A They are rare, but the travelling of a special program--of a star--that kind of a request which comes under "please the star" category, when you have a major star who wants--and this getsback to the point I just made, a big one, not a little request, like I consider $25,000 an adequate sum, they would normally give that to Miss Burnett, Mr. Skelton, Mr. Jackie Gleason, even more when they want a favor.

And this lady wanted to go to Australia, CBS is rightly very proud of the Carol Burnett Show and is very proud of their relationship in supplying the program to Australia and I am sure that the whole company was delighted to have her go to Australia as a most able representative for CBS.

And they would do something like that. They often gave the West Coast stars one or two trips to New York. It was done on two bases. One that the West Coast star requested it and number two it was due to the fact they very often got people in New York who were very productive for making the program more successful. But these budgets

for transportation were never in the original deal, never. I mean you never got an item, $30,000 for two remotes in New York, or Australia something like that.

Because those are all trade off deals with the airlines, with the hotels, with--let's face it, ABC on Australia, I am sure that Graham White who heads that paid a lot of their expenses because obviously this $25,000 figure to Carol Burnett was a tiny, miniscule part. That must have cost them $250,000 to go to Australia. Now where did the other two and a quarter come from? That came from--I don't know, United Airlines, Pan American, Australia Tourist Office. You name it.

Q So that you would think it possible that on rare occasions with something special like that variety show, they could obtain an additional fund?

A Yes, provided the variety show was successful. Or failing, either one.

Q Now there are two variety shows on CBS network television this week. Let's talk about all the rest of the programs, the soap operas, the situation comodies, the dramatic shows and so on.

Would you envisage it as conceivable that per use world that a producer wanting to get some special music written for a particular week's program would come to

CBS and get a special allowance for background music?

A For an existing series?

Q Yes.

A I wouldn't think so. No. The answer is no.

Q Have you ever heard of a producer of a--

MR. TOPKIS: Let me formulate it this way:

Q Again referring to the testimony of Messrs Wright, Vincent and Sunda, you recall that they uniformly testified that they liked making what are called, I believe in the industry, trade offs.

And that they thought that their capacity for making trade offs would be enhanced if they had additional money to play within the form of an allowance in their budget for music.

Do you remember that testimony?

A I do. I don't understand their use of the word trade offs.

Q What do you mean, sir?

A What do you mean by trade offs?

Q Well, they said, as I recall their testimony, that if they had money in the budget for music and money in the budget for scenery, one week they could use most of the combined monies for scenery and another week they could use most of the combined budget for music and thus when they

wanted to emphasize scenery as a creative matter they could, and when they wanted to emphasize music as a creative matter they could, and so they would have greater creative flexibility.

If they had an additional item in their budget for music. Do you remember that testimony?

A I do.

Q Do you agree with it?

A It would be--if you start from the premise that--You must know how a variety show comes into being as planned every week.

A variety shows is planned around who are the stars, plus the fact--this is rather important I think to your discussion, national work like this, there is not a strange one, except maybe something like Hee-Haw or Laugh-In, where it is a mechanical difference, but the variety shows in question, Danny Kaye--I mean Sonny and Cher, and Carol Burnett, Joe Hamilton's the executive, the producer of that show, Bob Henry I think--no, I forget who now is the producer, but Joe is the executive producer, Arnie Rosen I guess is the producer now, he was the head writer but that proves my point.

Arnie Rosen is the producer head writer, Arnie Rosen looks at his--remember, a variety show is planned and

produced in about seven stages. There is the booking stage, there is a rehersal stage, there is the assignment of sketches, re-write, post-production. I mean if you look n in a producer's office it looks like a factory production board and there are six or seven different levels of the production.

But ahead of everything else first is the booking, because when you have Rex Harrison on, first it is Judge versus Judge. Fred Muggs must plan a different kind of show. And if you have a singer on versus Don Rickels that is a different kind of a show.

THE COURT: By the booking you mean the star?

THE WITNESS: The stars. On a variety show the flavor and the context of the show is entirely determined by the sar. And once that star is set the producer then, or the head writer like Arnie Rosen of the Carol Burnett show calls the 12 neurotic writers into the room and he makes assignments and he says--these three guys do the monologue, and three other guys, you do the big sketch, say there are three sketches, and there is one guy who always does say Carol Burnett's closing, or her questions from the audience, whatever it is, it becomes very specialized. These writers go out and work. They don't know anything about scenery, don't know anything about music, they don't know anything

about anything else except writing the heart of the show, that's comedy.

Now, at the same time the producer then sits down and talks to the choreographer, Peter Gennaro, or John Butler or something like that.

And he then discusses what Carol likes to do because it is her show, or what she's done enough of, or something he wants to do which she hates. Then he plans that, and then when the guest star comes in they tell him what to do from stop to--from the start to the bottom.

Now, in the old days the biggest stars used to say we ain't coming on until we get this or that. That's pretty well gone. Because the day of having Doris Day do, you know, that big song she sings, or Diana Durban, or whatever it is is gone, we are now in a producer's controlled vehicle. Just like in the movies. People do--Dustin Hoffman does what he is told to do. He is not that big a star he can tell Otto Preminger or Don Mangowitz or Fred Zinneman what he wants. They will just get another boy whose got a crew cut. So it is not a big problem. The star system is gone.

Now that isn't to say that a star, dancer-singer--I mean you wouldn't expect Carol Lawrence to come on and do the Gavotte. She'll do what she does in a very good way. So

she will bring together something she wants to do. But it must be in the context of the show. But there are a number of forces that are in play, but the controlling factor, which is the giant one, is the interest of the star whose show it is, and the producer. Because as is in variety shows, the real stars, the trade off--the word trade off as used in the business is I will go on your show, you come on my show.

But when I come on your show I will do what you want. You come on my show you do what I want because it is my show.

Because it is like in being at my house we have to eat at 6, I will go to your house we will eat at 9. That's the custom and useage in the business. You do your own thing on your own show. And you watch the variety shows, the variety shows are mainly trade offs. Whether it is a situation comedy or anything else you wouldn't go on a situation comedy where they very often go now, bariety stars and do what they are going to do. They are not going to break out in Old Man River, they will do what the script requires.

And the same thing happenson the variety hours.

THE COURT: How does that relate to the question?

THE WITNESS: The question has to do with the fact

that when they come in to do the show the pre-conceived planning at the heart of the story editor and the writers and the requirements of the star and the requirements of that specific show, the mechanics of it, determine the content of the show.

Content of the show is not determined by any single aproduction limit ever. That's the last thing they get to.

So if they go over on music a little th s week they will make it up next week. If you go over on y this week it is less next week. If you need more da this week you cut back. But essentially--that's done times, I mean by that by music I am talking bout 15 t instead of five trumpets. I am not talking a:ut whethe you use a particular tune or anything like that but the number of performers sometimes is determined b' he show itself.

But there is complete flexibility for tho e people always to do exactly what they want to do for the writers because the writers always have enough money writers can do whatever they want. There is never a h for the writers creating exactly the show they want.

Q Do I understand you to say, Mr. Dann, that in yc

MR. TOPKIS: Strike that.

Q Mr. Dann, let's leave the two specials for a moment and come to--I'm sorry, the two variety shows for a minute and come to specials.

There are a number of specials as they are called in the trade that involve music, broadcast on television networks these days, aren't there?

A Yes.

Q Something like the Frank Sinatra Show the other night?

A Yes.

Q Or another, Liza Minnelli Show, something like that? They are both specials?

A Yes.

Q Now, when such programs are sold they are sold on a budget?

A Yes.

Q Would you expect that the program producer in a per use world would come back to CBS and say I want some more money for a song?

A In my 20 years I have never heard that.

Q Well you wouldn't have had to in your 20 years because you were operating under a blanket license. I am asking you now about this hypothetical world in which we are dealing in this lawsuit. Would you expect that a producer

of such a special who would have I suppose a budget?

A The average special costs 450 and $700,000, and that would be his budget for the show. Or his sales price to the network.

Q And it is sold to the network for a firm price?

A Sometimes to a client, but always to ... other on a firm basis. Networks are inclined to be more lenient sometimes in dealing with a supplier than clients. Clients and agencies when they make a deal are quite--that's the deal that--the advertiser sees if we bought it at this price that is it. Networks on rare occasion, not only specials though, that it is different. Specials would be a fixed price. And if you lose--and we have known people for one reason or another to go over budgets, production or something. The price is fixed. Not subject to renegotiation or repricing.

Q That is so far as the network is concerned?

A Absolutely.

THE COURT: You say the price ranges between 450 and 700,000?

You named both figures, is that the range?

THE WITNESS: Yes, sir.

Q Mr. Dann, there has been testimony here by Mr. Sipes--and you have read Mr. Sipe's testimony?

A I have.

Q You recall he testified that if CBS tried to obtain music rights, music performance rights directly from the copywrite proprietors, writers or publishers, he would expect that they would be disinclined, to use his term, to deal with CBS.

Do you recall that testimony?

A I do.

Q Mr. Dann, in all your years with CBS did you ever encounter anyone who expressed any disinclination to deal with CBS?

MR. HRUSKA: I object, your Honor. I think it is irrelevant.

THE COURT: Well, I think for the reason that you pointed out in one of your earlier questions that wouldn't have happened under a blanket license, it is unlikely, but I will allow you to ask.

MR. TOPKIS: Forgive me your Honor, my question is much broader than music.

MR. HRUSKA: That is why I am objecting to it, your Honor.

MR. TOPKIS: I think that is exactly its relevance. The idea that anybody--

THE COURT: I might say that if you are suggesti

that Mr. Sipes testimony should be determine to mean they were disinclined to deal with CBS because, for example, there was something about CBS they didn't like, or the people or something of that sort, I didn't get that feeling. I will be glad to look at the testimony.

MR. TOPKIS: No, no. His testimony was that he was fearful, I think he said, that songwriters and publishers would be disinclined to deal with CBS. And he said that's the only reason direct licensing wouldn't work.

MR. HRUSKA: I object, your Honor. I don't think that's a really good characterization of the--

THE COURT: Well, putting aside the characterization, I don't want to spend a lot of time here and I may allow the answer to the question, but I must say that to ask about what's happened in the past under a system entirely different from what is being posed doesn't seem to me to be of very much probative value. If you want to ask Mr. Dann whether under the same circumstance put to Mr. Sipes his view would differ as to what the result would be, I think that would be meaningful to me.

MR. TOPKIS: Very fine.

Q Mr. Dann, if CBS were to attempt to license music performance rights directly by dealing with copywrite proprietors, composers, publishers, for its backgrou..

theme music or previously composed music as for variety shows, would you expect that the writers and publishers would be inclined or disinclined to deal with CBS?

A I think they would be inclined to deal with CBS.

THE COURT: I think it would be worthwhile for all of us to know why you feel that way, Mr. Dann.

Q Yes.

A Speaking as a program man my whole life is dealing with creative people, directors, writers, producers, composers. And when I deal with them I know more than anything else they want to get their materials used.

An actress wants to work, a director wants to direct, a writer wants to write and the composers that I have dealt with over the years, the Moose Charlop, who did Peter Pan, but even the big ones like Frank Lesser and Jule Styne, Irving Berlin, Van Hussan and Kahn, those very powerful men all realized the importance of network television, and--

MR. HRUSKA: I move to strike that, your Honor. I think that is based on hearsay.

MR. HRUSKA: I move to strike that, your Honor. I think that it is based on hearsay.

THE COURT: Mr. Dann is giving his impression, his reasons for having stated his opinion. I won't take it as gospel truth.

A In my discussions with Irving Berlin, in my discussions with Frank Loesser, in my discussions with Julie Styne. inmy discussions with Van Heusen and Kahn, in my discussions with Moose Sharlap, I have always found them intensely eager to have their works performed on the air as quickly as possible, that existed, and I always found them unless they were bus, on another assignment or not interested in your project creatively, willing and anxious to talk business.

Now, the lesser important composers that I dealt with who obviously are usually out of work, most of the time -- the average composer is not working for anybody at the time, the average writer is not working, the average director is not working, the average actor is not working.

The creative world is out of work most of the time. So when you go to the lesser lights -- you don't go to them. They find out you are looking, you can't keep them out of the office. The problem is to keep their agents and publishers and everybody away from you. They are also

available and anxious because they want to -- you know, most of all they want to work.

The big powerful ones who are in the movies, the well known ones to any degree or who have done work on Broadway -- I will give you an example. When Moose Charles had Peter Pan he did it in San Francisco and L.A. for 11 -- Ed Lester, the Los Angeles San Francisco Light Opera Company, nobody knew about Peter Pan before it came in. They knew about Peter Pan. They thought it was no music.

THE COURT: Was that the Mary Martin?

THE WITNESS: Yes. When Mary did it on television, the whole new world opened for Moose. He wanted to be on television all the time. I remember Julie Styne calling me over to his office three times a year to try to get Christmas and holidays shows on. Irving Berlin always wanted a special show done about his music. He loved it. He thought he should share it with the world. It wasn't just money and anything else. It had to do with the fact that music composers -- if you fill this courtroom, which I pray you don't with them, they are a very strange group. They are intensely devoted to their art.

I suppose if you took all of our composers and put Beethoven and Chopin and some of the fellows together, it wouldn't be such a normal group emotionally. They are

driven to create and have their works presented. When you give them an assignment, even having theme music -- when we started one series, CBS Playhouse or something, and CBS Playhouse the network was very proud of, we went to Aaron Copeland to do the theme music, for a Brancusi show on a pedestal that was revolving. Aaron Copeland was -- I forget, somebody in the courtroom will I am sure correct me. I know that he was only anxious to write them music, to go behind the credits. That is Aaron Copeland, a man of certainly front ranks of American composers.

I am trying to establish the fact that the thrust of those who create music is to see their works performed and have the challenge of working. It would be difficult for me to believe that a composer will ever say or his representatives, forget it, we don't want to do business with you.

THE COURT: I understand your reaction to the general proposition. I am not sure whether we placed any conditions in the question or whether Mr. Topkis did last time.

I am going to place a condition now. Supposing CTN or CBS, whatever you call it, no longer operates through ASCAP, whether it cancelled its contract or whatever, but NCB and ABC continued to clear through ASCAP, do you

think these composers would be more likely to go to ABC and NBC with their music and to forget CBS?

THE COURT: Practically, Judge, all music is requested. You don't -- these aren't men walking around with attache cases full of music. 95 -- there must be a percentage here that must be more competent than mine. They eithermake music they have created available to whoever wants it, and they can make it available to whoever they want to.

You can have Old Man River sung on two networks at the same time opposite each other, you can have theme music opposite one of their times if I understand what you are saying, it doesn't make any difference if one network is operating one way and another way because all a composer has to do is to say yes or no, he is not going to say no to a network because they have to clear it through ASCAP.

I don't think so.

THE COURT: All right.

Q You have described generalities, Mr. Dann.

Let me focus on a particular -- you did mention Aaron Copeland, of course. Let me urge you to focus on theme and background writers generally, the composers who write such music. Would you expect ther to behave in the same way that you have just described?

A People who write music on assignment are either out of work or don't have the right to write something at all unless they accept an assignment from the producer. For a producer -- for a composer not to write theme music means that either he has to go and do something else or he has to give this an opportunity. I have tried to establish that the essential thrust of a creative person, any place, is to create and perform particularly with the composer. So whatever role you are talking about, if you make it more commercial in the sense of less creative by having to write theme music for Mannix, which is some sort of a violent beat of drums and racing, I think even then the composer takes that as a very serious challenge to write something he likes. He sits down and he knocks out something over a period of weeks that he and the producer together and the people on the staff like. The way it works, you see, they call somebody in, they may call two or three people in.

Q Composers you mean?

A Composers and they talk to them about doing it. You just dont' get suddenly to do it. You call the different composers in and the guy that hits it gets it. You have three different themes written. I have known a lot of themes that didn't get on the air. When it doesn't get on, they pick the one that does get on. Then they work

with them and they make them redo it, tighten it up, put more snare drums or something else. They often work very closely together withthe creative group. You must remember in a show like -- a show that has a producer or a director and a musical conductor -- every show has a musical conductor. You take someone like Mort Lindsey who did -- arranged the music for Sound of Music. Mort is on Burnett or Griffin. When a composer comes in, they sit and talk in a world you don't know about. Every show has a number of musically trained people. That is why we have such good music usually.

They get with the sound engineers. It is a process that goes on for weeks. Sometimes they give birth and sometimes they don't. The challenge isn't the business arrangements, it is the creative ones.

Q There has been a suggestion voiced here, Mr.Dann, that CBS might lose star performers if the star performers couldn't sing what they wanted to sing.

Do you agree or disagree with that expectation?

A I don't understand the question. Lose star performers from what and under what circumstances and where?

Q I think there was a suggestion that if Steve Lawrence couldn't sing the song that he wanted to sing, you might not be able to get Steve Lawrence to perform on CBS.

A On what?

Q On a Burnett show or another variety show.

A Only time -- you have two times in booking a star, a single star -- I apologize. I have to answer by explaining.

Q Please.

A The two times you cannot have a variety star -- you don't have complete freedom with a variety star is if you require him to do a specific song, he will balk, one particular song sometimes that he doesn't like to do because he says it will make him look bad, or the other side you get into trouble is when he wants to sing a new release. Aside from that -- I mean, if you know Steve Lawrence or any singer he sings 600 songs a night in a nightclub, 1200 in the shower. He doesn't care. He never sings anything that doesn't please him or makes him look bad.

On the other hand, I have known of times in early television, not now, I have already established the ground rules, and I don't want to bore you with it, of how one goes on a variety show.

In early days the Supremes or a particular musical act would go on only on the basis that they could plug their new record. That is the time they have control. To sing their new song they will say I will give you one stand.

but I want my new release. I think that was probably true on the Sullivan show very often where Ed was very wonderful to all performs. He always let them do what they wanted. It perhaps explains the nature of the show. He also let the stars do what they wanted. He only concerned himself with one thing, poor taste. The performer would not be lost today from television because he wanted to sing a song, and Carol Burnett said you can't sing that song and they would fly off in a huff, that doesn't happen now.

The big problem is whether she is going to do the whole show. You have today on variety shows if you look at them, the guest star works the whole show. It is a rather substantial effort. They don't do walk-ons unless it is a gag. So it doesn't ever rest upon a piece of musical material. It rests upon perhaps the -- something they don't want to do. they don't like working with the other guest start or something.

I think the boys who you had testifying on this who I know are quite close to the variety singing picture, would have to go back to the archives of television now to substantiate the position that you are going to lose a singer because he can't sing a particular song. I think that would be wrong.

Q Mr. Dann, the sentiment has been expressed

here that CBS is an extraordinarily efficient and imaginative operation. Would you agree with that statement?

A The best.

Q Would you agree if there were some problem in establishing machinery for direct licensing of music performance rights CBS could somehow or another adopt its talents to cope with that problem?

A That is a difficult question to answer.

MR. HRUSKA: Can I have that read back, your Honor.

THE COURT: He already indicated he can't answer it.

Q It has been suggested here, Mr. Dann, that there is no machinery available today whereby music performance rights could be licensed directly by negotiations between CBS and composers or publishers?

Were CBS to decide to seek to license music performance rights directly, would you expect based on your knowledge of CBS' problem solving capacity that it could get some machinery created?

MR. HRUSKA: I object, your Honor. I don't think there has been any foundation for this.

THE COURT: I think youhave to ask Mr. Dann what thought he hasgiven, whether he studied it and so on.

I don't doubt that he could have a broad opinion. I don't think it would mean very much unless he is given specific thought to the problem.

A I have given no thought to the specific problem of implementing direct licensing of the composer at all.

Q Very good, sir.

Mr. Dann, did you read Mr. Sipes testimony about the programs in the can and the problem that they would create, a $100 million inventory and so on?

A I did, but I --

Q Are you having trouble recollecting it?

A I would like to be accurate. I wouldlike to be refreshed.

Q I believe he testified that one barrier to CBS' going onto a direct licensing basis, that is to say dealing with composers and authors for music directly would be that CBS now has in the can an inventory valued at approximately $100 million worth of programs which have already been filmed which contain music and that if CBS had to go to the copyright proprietors today and obtain the right to perform that music by negotiation, the copyright proprietors would hold up CBS.

Do you remember that testimony?

A I do.

Q Do you share Mr. Sipes' expectation that the copyright proprietors would hold up CBS?

A I read Mr. Sipes' testimony, I did not see any reason pointed out as to why the composer and his representatives wouldn't like to have more exposure of his creative works and more income. If neither one of those reasons can be answered, I see no reason why there would be anything but the minimum of difficulty in coming to an agreement because either CBS' television network has the right to play his music and has the right to pay him money for it or nobody gets to see it or hear it. It is as they say "the only crap game in town" and I would think that -- quite the contrary, that a composer and his representatives would be quite anxious to negotiate with dispatch additional performance rights. I am trying to say the problem of negotiating additional performance rights has always been looked upon I thought by any create person as a very pleasant meaning.

Q There was testimony also that commercials, filmed commercials also are in the can in large number and some of them contain music, and that too would create a problem because the proprietors of the copyrights of that music would hold up CBS if it sought to obtain performance rights by direct negotiations.

A That would be even I think less accurate than

my -- than the previous point because, first of all, most commercials have a six to nine month longevity, maximum of a year, with the result that -- by the time you came to some sort of a decision as to a date, when they didn't no longer have the rights, that would be used up. But the second point is that in many, many cases when it is nya music of importance, the advertiser always in the -- they make the original deal, they own it. Coca Cola, Pesi Cola, United Airlines, they are not going to get into any more negotiations with the composer. They make that deal straight away and own it. No agency of any responsibility or client, very sophisticated, intelligent people, having nothing to do with the problems of this court, would let themselves exposed to this problem.

So I think if you went back you would not find it.

The third thing is, if that commercial is not used because the composer doesn't want it done, that commercial is never used again. You know what? Every advertiser has some commercials he either will substitute music or he won't use it. The only one who will suifer will be the composer. I think there is less momentum there on the part of the composer to act.

MR. HRUSKA: Your Honor, I move to strike that entire answer that Mr. Dann has just given in response to that question. I don't think there has been any foundation laid.

There were no questions asking Mr. Dann whether Mr. Dann has ever seen any contracts between advertising agencies and composers, whether Mr. Dann really knows how many commercials, usable commercials an advertising agency has to stock for any particular client -- all of the other myriad of details, data and facts that would have to go into the formation of any sensible opinion on this subject.

THE COURT: Mr. Hruska, I am trying to separate, and I believe I am successful in doing it in my mind, what Mr. Dann has said on the stand today with regard to his own experience from what I know about it in the past, and I believe on the basis of what he said only today on the stand that he is certainly qualified to answer the question, but of course you are certainly qualified to break down his opinion by cross-examination, if you can.

Q Mr. Dann, you spoke before of composers being anxious to have their music performed on the air.

Within your experience, are the composers of music for television commercials any different in that respect from other composers?

MR. HRUSKA: Your Honor, I object to the question.

THE COURT: I think that is pretty broad. There might be some composers.

I think Mr. Dann indicated that it is his opinion that in general all musicians are anxious to create and let the world hear their music and I don't think that opinion interesting as it is, is so far from the experience of many of us in the room that it can't be accepted.

Q Mr. Dann, you said that if the composer didn't want to have his music performed in a commercial, the sponsor or the advertising agency could substitute other music in the commercial.

A Certainly.

Q Do you know what it would cost to substitute new music onto a 30-second commercial?

A The mechanical costs?

Q Yes.

A Hundreds of dollars.

Q Low hundreds or high hundreds or don't you know?

A It depends on the requirements.

To dub a new track, it is not terribly expensive. If you would have an orchestra it is one figure. I mean, that is why we have to be careful in the semantic point.

If you are talking about the production costs for a new commercial track, andyou had a full orchestra, it could be one thing.

If it is an organ or a piccolo, it is much less, but the mechanical process of putting on a new track is a very small thing, hundreds of dollars on the low side.

THE COURT: When you talk about Coca-Cola owning its music and so forth, is that class of music generally what is known as jingles or does it go beyond that?

A I think they would own any major -- I now am addressing myself to something I know factually because the same people are involved in doing things for us as for the programs, commercials and programming.

Major companies will not embark -- I was -- I have discussed this with advertising heads and people who have wanted the reactions to commercials -- on a major program effort without having full and total rights for a long time to any ditty they exploit, because they can really make something happen.

It is not just their taking popular, Judge, thematic music that you like, like the night airlines, "Up, Up and Away."

It is quite the other way. The Pepsi-Cola or the Coca-Cola jingles have been made into songs and it goes the other way. I am sure they get royalties from the songs or at least the right to get royalties from the songs.

MR. TOPKIS: Would it be convenient to take our luncheon recess now, your Honor? I am about to go to a new topic.

THE COURT: It would be convenient.

It would be more convenient for me if we didn't return until 2:00. Is that too late for you people?

MR. TOPKIS: No, it is all right with us.

(Luncheon recess.)

M I C H A E L D A N N resumed.

DIRECT EXAMINATION (continued)

BY MR. TOPKIS:

Q Mr. Dann, just a few more questions.

You testified, I think, that the budget for a one hour special might run from $450,000 to $750,000, is that right?

A On the average,yes.

Q What is the budget for a one-hour variety show? What does that run?

A You have to be careful because the original price of a new program is sometimes lumped together with the repeat price. They come out with a gross figure for the total number of programs.

But I would say that the cost of a new hour today, that has only been on the air a couple of years will be somewhere around 200 to $20,000 anhour, maybe a little higher, but I wouldn't think so.

Q And what does it cost a sponsor to put that program on a network?

A Well, the prime rate today, I would suspect, would be in the area of 200 -- slightly over $200,000 on the CBS Television Network.

Q Assuming the usual number of stations picking it up?

A Yes, but on a variety show they manage to clear the full lineups, so that I think somewhere -- I think that my figure for program and time and the business on the networks is very good now, and it has been, so I would suspect that the figure of $12 million would be the bottom side of revenue from an hour and --

THE COURT: Per annum?

A For a year, 52 weeks. $12 million for the year would be on the bottom side.

I would think it would go to 14 without too much trouble. Maybe I am wrong. I am sure other witnesses can give you a very precise figure.

THE COURT: I am a little confused and I am not quite sure what Mr. Topkis means by cost.

Do you mean cost to the producer or cost to the sponsor? They are two different things, aren't they?

THE WITNESS: Quite. Because one includes profit and one doesn't. The average sales price of a special in the hour variety form ranges from 400 to $750,000. If you define Peggy Fleming's ice show in Russia, that Bob Banner put on about five or six weeks ago, I know that cost the American Telephone Company in excess of $600,000. It

would be impossible, I think, for anybody, including Bob Banner to decide what really -- I am sure it didn't cost $600,000 for him, but how much the Russian Government paid and how much they got from selling around the world and how much rerun rights were, but I would say it was a substantial profit, but when you do a special, you really try and get your money out of it the first time so there is a substantial cushion between the selling price and I can't define the word "substantial" but the substantial difference between the selling price to the sponsor or network and the price it costs him.

The one thing he never does is make the special before it has been sold.

Q Mr. Dann, you read the testimony of Messrs. Vincent, Sunga and Wright?

A I have.

Q At one time or another have they all worked for you?

A I suspect they have. I don't know their exact performance records --

MR. HRUSKA: Excuse me. Your Honor, I am afraid I didn't hear either the question or the answer.

THE COURT: The question was whether these

gentlemen had worked for Mr. Dann and he said he suspected that they had.

Q Now, Mr. Dann, have you read the testimony here of Dr. Fisher?

A I have.

Q Do you recall his testimony that the adoption of a per use system would mean that more music would be performed on network television written by different composers because there would be price competition among composers to get their music on the air? Do you remember that testimony?

A I do.

Q Do you agree with that forecast on the part of Dr.Fisher?

A No. I don't think that any structure would create more music on the air. I think that is a decision between the producer's needs and the composer's ability to supply it, but I didn't understand from Dr. Fisher's testimony why the right for the producer to go to the composer would give us a wider range of music.

I can see why -- I can't see any reason why it would give us a new kind of music because, essentially, our music is now for the regularly scheduled film shows which is most of our schedule, practically 70 per cent I

would think, 65 per cent, they go to them for the theme songs -- they go to who they want.

Q Who goes to whom they want?

A The producer, the music director, the director, somebody on the CBS staff may be working in the music department.

Q Goes to the composer he wants?

A Oh, sure. And whether or not they go for new music versus existing music on a regular basis, I think has to do with really a belief in what is best for the show.

Q Would that be true on variety programs and ordinary programs for which theme and background music was being written or do you distinguish between the two?

A No. I think when you go for theme or background music that is so important to the star, what music is used that they, whatever they really believe is going to work, they want.

Now, it is true that they don't know what is going to work until they hear it, so what they get out of any individual composer may change and they may revert back to something already written because they can't find anything.

I have known examples of that but I don't think

that -- I mean when you have a production going on the air -- they all think they are going to be on more than one year; this is the big chance of their life; goes for the best they can get in every element.

I wouldn't know of anybody who-- either -- it is not a definition of a creative artist or a producer to compromise at the outset, ever.

THE COURT: Are you saying really that even if Dr. Fisher is correct that composers, now composers might be motivated to write more, that maybe i recall because that is not the way music gets on television. It gets on television by the people who produce things going to the composers they want to?

THE WITNESS: Yes. I don't think that new composers, that composers need motivation. Creative artists walks around with torn shoes or being rebuffed, even if he is fairly prosperous and had a few hits five years ago. The creative person is generally rejected and therefore he doesn't need to be the one--I mean that's his problem. He's been turned down too often.

I think the question is whether the producer would be more inclined to use him, not whether he was more available.

Q Do I gather then, Mr. Dann, that it has been your experience that there are more composers than there is demand for their services in our culture?

THE COURT: Well, never mind the culture. We are talking about this particular segment of--

Q Network television, whatever.

THE COURT: Yes.

THE WITNESS: I would say that on a kilowat basis

or something or a percentage basis, that the resources of the total composing industry is being tapped on the basis of five per cent of its total or ten per cent of its total maximum capacity and that the outlets on television alone are a very small percentage of--represents a very small possible use for that talent, so, therefore, I have to assume automatically that the ratio in favor of supply and demand is clearly in the hands of "the buyer."

MR. TOPKIS: No further questions.

Thank you.

THE COURT: Mis Kearse, do you have any questions?

MISS KEARSE: No, your Honor.

xx CROSS EXAMINATION

BY MR. HRUSKA:

Q I would like to pursue that last point a little bit more, Mr. Dann.

Did you assume a system in which, for artificial reasons--we need not for purpose of this subject get into the reasons--every composer who was hired by a producer of a television program, a composer of original music, someone hired to score the show, that that man had to be paid $10,000, irrespective of who he was and what kind of job he did?

Now, under those circumstances would you expect that the producers of the program would go to the tried and true, experienced composers and pretty well limit themselves to these people?

A I think the producer of a program, as he does now, will always go to the people he thinks will give him the best score, never change.

Has nothing to do with how much somebody is going to charge him or what the going rate is.

The music used for themselves in television is such a small part of the total budget that he can afford the luxury of having the best always.

Q All right.

Now, let us drop the hypothetical $10,000 a program and let's assume that suddenly that limit is wiped out and producers and composers would bargain for the price at which composers will score the program and let us assume some new composer comes in who has not previously been a lead scorer of a program, who has done some work in the industry who perhaps has published two or three popular songs that have met with some success and he approaches the producer of the program and he says, "Now, I know the going rate has been $10,000 but you know I am willing to work for 500; give me a chance."

Do you think under those circumstances that it is conceivable that the producer of the program might give that writer a chance?

A No. Not any more than he does a writer.

Q Totally enconceivable to you, sir, is that it?

A Well, we don't do it with young actresses, young writers, young authors, young choreographers.

Q Never happens?

A The only way--well, I brought Norman Jewison down from Toronto, Canada, for $150 a week but I thought he was worth a lot more. You do it when you believe in the person not because he cuts the rate but it is a chicken and the egg.

A producer, you must realize, Mr. Hruska, works at a very pressured pace. His goal at all times is maximum quality. He is in--you walk in a producer's office at CBS or NBS and you see the people hanging over them, the pressure. Somebody says, hey, I can do it for half, do you want to gamble on me. The guy says, Who is he, Idon't know him. He won't fool with him, I don't think. And I think precedent will show they do not address themselves to the money factor first. It is who the man is and the money is maybe the last thing that comes up.

Q But if there is some basis in a producer's mind like the basis you referred to a moment ago, your faith in Jewison, some faith in the producer's mind that "This new writer just might be able to click on my program, he is a little more of a gamble than some tried and true person," in those circumstances do you think that it is conceivable that the producer will hire that writer?

A Our industry has grown based upon the assumption that the producer will always give the new young person he believes in the chance.

THE COURT: I understand, however, that what you are saying is you are giving him a chance because you think he has talent in his particular field, not because he happens to agree to work for you at a lower level?

THE WITNESS: Right. It is never a factor. There is no such thing.

This is not a tonnage business. Program failure is program failure and you cannot live with it at any price. It goes off.

THE COURT: Would you compare the going to a doctor who would be willing to perform his services for you for less that you didn't have as much confidence in?

THE WITNESS: That's an adequate comparison, yes.

Q Do you think that $2,000 a program is a meaningful

sum to the producer of a television variety program?

A Only to the extent it is emergency. But in terms of the way they live it is an extra half hour in the studio, it is a camel hair coat.

Q You have never known of a situation, Mr. Dann, in which the producer will attempt to save $2,000 on the--

A It is part of everything. He cuts every place he can because he wants to pick up 60 or 70.

You know, $2,000 over or under at any point nobody in our business ever looked very hard at.

Q Mr. Dann, did you ever work as an on-line producer of a television program?

A Never. Never.

Q Did you ever negotiate package prices with the producer of a television program?

A Many times.

Q At NBC?

A Yes, and in a way at CBS.

Q At CBS?

A Yes.

Q Could you give me the names of the packagers with whom you negotiated while you were at CBS?

A Now you are talking about--you know, I don't want to be caught with a semantic deal, premise.

Since you asked me about NBC would you rather I skipped NBC?

Q Let's concentrate on CBS, yes.

A All right. I don't think that there was a major acquisition, including Judy Garland from Dave Begelman and the Danny Kaye negotiation with Ted Ashley or the Tommy Smouthers deal with Sol Leon of the William Morris office, that I was not deeply involved in all the give and takes of a negotiation at given points.

Q Could you--

A Major points, not fine print.

Q I would like to get a little more specific on that if we could. What do you mean by deeply involved and what do you mean by major points?

A In an arrangement between the network and the traction, be it a specific star or a concept, I mean, a something, as we call it in our business, a Judy Garland or Danny Kaye, it is a Laugh-In or Hee-Haw or something like that, there are a number of key limits to the deal that a network must be satisfied about.

You have to be satisfied about the procedure. I would make that decision. I have to be satisfied on the approximate number of new shows. I would make that decision. I have to make--be assured of the various creative limits.

I would have to make that decision. I mean the specifics of who they were. The point of origination, I would have to make that decision. The approximate allocation for guest stars was subject to my approval.

As a matter of fact, in many cases I suggested the amount for guest stars.

Q To whom?

A Either to the agent directly or more normally to the vice president for business affairs or a member of his staff who was working on the assignment.

Q You are talking about Mr. Sipes or one of his assistants in his tenure in that job?

A That's correct.

Q I don't mean to interrupt you, sir, but I meant to limit the question to your negotiating with the packagers of these programs as distinguished from any ideas you may have communicated to the business affairs department regarding requirements for the program.

A I don't know at what point you feel a negotiation starts. If you are suggesting that when Sol Leon says to me "Dick Van Dyke wants to work," I say to him "He's got to be ready for this fall, "And Sol Leon of the William Morris office, who represents Dick Van Dyke, says he can't be ready until a year from now--at that point the negotiation

starts.

If in your definition the negotiation starts after I say "I want theman, I want him this date, Sal, take over the deal" that doesn't happen like that. We don't have that separation of church and state, because all during this time I have negotiated or suggested things to the agent, conceivably to the star, and to my own business affairs man, so that in the endin my history at CBS, as I said this morning, I never lost a deal, because if it was a separation of church and state like you suggest and I turned it over to Mr. Sipes or Mr. Iannucci or Mr. Harrison to negotiate he might come in and say "He doesn't want to work until a week from Wednesday" or "he doesn't want to have your producer."

A key part of the Danny Kaye negotiation was whether Danny would work in New York or Hollywood and whether Bob Banner would be the producer and that negotiation I carried on with Ted Ashley alone in Danny Kaye's room in New York.

Now, that is a negotiation from my point of view. It may not be in the light of what you are asking.

Q No, no, no. I don't disagree with that at all. Let me narrow my question.

Have you engaged in negotiations with program packagers regarding the cost of program elements and the cost of the package, the cost of the ingredients of the package and the cost of the total package?

A I did not.

Q You said something before about you wanted to be satisfied about the producer. In your experience is the ability of the producer, the level of his expertise and competency in the job, a significant factor in making good television programs?

A The critical factor.

Q Are there hundreds of people who can do this at that level of competency?

A There are not.

Q Could you give us some estimate?

A In what facet of television programming?

Q Let's take music variety programs.

A Musical variety shows today, I would say there are -- well, I had to go out last week in Hollywood to talk to what I consider the key ones who would be satisfactory for me. I talked to eight of the twelve. There are no more than twelve variety producers who I would find acceptable today.

Q How about producers of television series? Would you make a distinction there between comedy and dramatic series?

A Well, even in drama it breaks down between westerns -- there is a classic western producer. There are some producers that are incompetent of doing a continual weekly [illegible] and there are some producers that can do something like the Colombo series and nothing else, where they do four mini series. Those are people who came from the motion picture industry.

But I would say in general in answer to your question those who can do dramatic film, drama for television -- by that I mean many episodes during the year, somewhere between 18 and 25 -- there are probably 35, maybe 40 who could do that.

That doesn't mean they are all available. They

may be off making features. You know, our business people move in andout to different forms.

Q When you say features you mean theatrical features

A Theatrical, Broadway, lots of things.

Q You said in television network television you g o for the best in creative elements. I would like to ask you, sir, whether you agree that the inability of the producers of CTN programs to use a substantial amount of the ASCAP and BMI music which they want to use would destroy the competitive effectiveness of a large number of CTN's programs, thereby threating the network's continuing existence?

MR. TOPKIS: Oh, boy. I object as a matter of form. That is a speech, not a question.

THE COURT: It is a good speech, but I think --

MR. HRUSKA: It is not original, your Honor.

MR. TOPKIS: No. It was just voiced by its author and I don't want to hear it again.

THE COURT: In view of your broad question of Mr. Dann, if Mr.Dann feels he has an opinion on the question which has just been asked, I am willing to hear it. Whether he has an opinion is up to him.

Did you understand the question?

THE WITNESS: I did.

Q Do you agree with it?

THE COURT: Just a minute. What did you say?

THE WITNESS: I was going to answer.

THE COURT: Go ahead.

A I have never heard a variety producer at either NBC or CBS since 1948, and I heard them complain about many things, ever suggest to me that the ASCAP relationship in some way impaired their ability to present the finest programming possible.

THE COURT: I dnn't think that is what Mr. Hruska had in mind in asking his question. I think he is asking you to assume that for reasons unnecessary to announce CBS simply was not able to use ASCAP or BMI music and he is asking whether you think that that would be, in effect, fatal or a very serious blow to CTN.

THE WITNESS: But when you say -- not allowed to use any of themusic they performed?

MR. HRUSKA: I will rephrase it, your Honor.

THE COURT: Go ahead.

Q I would like you to assume, Mr. Dann, that for some reason, which is not important to factor into this question,it occurs that the producers of CTN programs are unable to use a substantial amount of the ASCAP and BMI

music which they want to use on their programs. Is that clear?

A That part is clear. You still haven't posed a question.

Q I still have not posed a question.

THE COURT: That is the premise.

Q I will now do so.

In those circumstances would that inability destroy the competitiveness of a large number of CTN programs, thereby threatening the network's continuing existence?

THE COURT: If you want to break that up into its component parts you may do so.

A I do not believe that the role of music is such in network broadcasting that any appreciable loss of certain kinds of music could threaten its existence, any more than a loss of a star in a program. The program goes on, it would replace it.

If on the other hand in your question, in your supposition, that losing a substantial part of it threatens the producer, the widest possible range of selection to put on the best program, it certainly would threaten the producer's right to put on the widest range of program. If he cannot have one song that he wants one time a year,

I am afraid that the producer would interpret that as a threat. But none of it would be so catastrophic as to threaten CBS or any other network's chances of survival.

Q Would it threaten the competitive effectiveness of CTN's programs?

A If at the present time CBS -- we are talking about the present and it could change. You could ask me about that. But if we have only two hour variety shows on the air, I don't think the Carol Burnett or Sonny & Cher -- they may disagree with me, I am sure they would be very upset if they heard this -- I don't think theCarol Burnett Show or the Sonny & Cher show, because they are essentially comedy shows, would be at all threatened for survival or even change in rating one point because of their limited music selection.

Q The question was not limited, sir, to the Carol Burnett and Sonny & Cher programs. I am asking you to assume n in the question that a substantial amount of the music that the producers of CTN programs of whatever nature want to use is unavailable to those producers. Would that destroy the competitive effectiveness of CTN programs.

THE COURT: I take it Mr. Dann thinks either that the variety shows are examples of his opinion or, if they are not, they wre the first category to deal with.

A They are the only category I thought you would want me to deal with substantia-ly because they are the only one where music is relevant. The other plays you could play any kind of music. You couldn't vary substantially periods of time in music, you know, like the One Horse Open Sleigh in a western picture.

But at any rate, the variety shows represent the maximum use of music, and if they aren't relevant, sir, to survival in a competitive picture inthe music forms, I suggest to you that in the film forms, which make up the huge percentage of competitive programming, it would be less so.

So I repeat, I do not think that it would be a factor in CBS's chance to be highly competitive in the market place. That would not have been true in the early fifties.

THE COURT: Why would it not have been true then?

THE WITNESS: Because the variety music form was so predominant and active and important in the early fifties -- we had the Perry Comos -- you couldn't do the Hit Parade, maybe, for example. You know, those kinds of top ten tunes show, or any kind of music forms, were very common. We used to have singing shows like Perry Como. Well, they have died now. The Glenn Campbell form fdied. I mean

singers -- because the music -- this is a very scientific or almost Talmudic kind of discussion --

THE COURT: This whole case has been quite Talmudic.

A But you know the musicologists argue why you can't look at new music being performed. If you have ever looked at the new music being performed, it is not very visual and television is a visual medium. They are rock groups and they appeal to a specialized group until they create one standard that everybody likes, so the problem has been that the popular singer form in television died, as well as the variety form, inessence, so that the only thing left is comedy.

Sonny & Cher is basically a singing act. Well, they had to make a go in television, so they made a comedy act.

Well, I will have an example, the Julie Andrews Show from England, and the Gary Smith, the producer of the JuLie Andrews show tried to do comedy, which was very difficult with Julie. She is not so good at it and the show died because it rested on her performance as an actor and a singer.

What I am saying in taking so long is that the musical form, as far as singing died in the fifties. If the

music form had been popular now, I would have more difficulty saying let Perry Como sing something else. It doesn't make any difference. Perry Como went on the Julie Andrews Show with the Sesame Street muppets, Friday night, they did 25 songs in a medley. If this hadn't been that 25 t had 3000 more to pick from, even if you slashed out of 75 per cent, but if Perry Como or Ethel Merman had been on the bouncing ball show, that would have affected the program but those programs are not around any more.

MR. HRUSKA: I would like to have marked PX908 for identification.

xxx (PX908 was marked for identification.)

Q I show you PX908 for identification, Mr. Dann, and ask you, is that an affidavit you executed?

A You asked me what?

Q Is that an affidavit you have executed?

A It is.

Q And you executed that affidavit on what date?

A July 7th.

THE COURT: What year?

THE WITNESS: 1970.

Q Did you read that affidavit before you signed it?

A I did.

THE COURT: It is the affidavit in this case, I take it.

MR. HRUSKA: Yes, your Honor.

THE COURT: I don't remember the substance, but I do remember Mr. Dann filed an affidavit in the injunction proceedings.

Q Could you look at Paragraph 10 of the affidavit, which is on Page 6. It reads, "For the foregoing reasons" -- and I will get to those in a moment -- "I have concluded that the elimination of the inaccessible BMI music would destroy the competitive effectiveness of a larger number of CTN's programs, thereby threatening the network's continuing existence."

A Yes.

Q Have you had occasion to read this affidavit in the last two weeks?

A I have.

Q Do you have it in mind?

A I do.

Q Is that a statement, the one I just read to you from Paragraph 10, with which you now disagree?

A Yes.

Q And could you tell me what occurred between July 7, 1970 and November 29, 1973, which has caused you to

change your mind?

A I think that essentially, over the pasttime, I have had had a more careful reevaluation of whether or not that statement was substantially true as I signed it and I think from what I have read that I am not alone from the people who signed such statements, and maybe now with the company, who have changed their positions somewhat, too.

THE COURT: Well, I will disregard that statement of Mr. Dann.

Q Mr. Dann, do you remember the day you signed this affidavit?

A I do.

Q Do you remember where it was?

A Yes.

Q Where?

A It was in the -- I think I am right -- in the board room of the legal department or in the meeting room in the legal department because I was not -- at that time I did not have an office in the building.

Q Do you remember coming down to my office, Mr. Dann?

A I do not.

Q Do you recall a conversation that we had in a

conference room at Cravath-Swaine & Moore regarding this affidavit?

A Excuse me. Was that the conference room?

Q Yes.

A I knew that it was in a conference room of lawyers because I did not have an office and I knew it was not -- and since I don't think in my whole life, fortunately, I was never in a conference room, maybe once, of the CBS legal department, that I can remember what it was like, but I am sure that what you are saying is correct.

THE COURT: Go ahead, Mr. Hruska, ask the question. He doesremember being in the room.

Q Do you recall that prior to coming down to my office to discuss this affidavit, that you had a draft of the affidavit supplied to you by theCBS law department?

A I do not.

Q Do you recall whatyou said to me whenyou and I discussed this affidavit? What you said to me concerning the content of this affidavit?

A I do not.

Q Would it refresh your recollection if I were to suggest to you that whatyou said to me was that "You fellows,"meaning the lawyers working on this case, "have

in a short time gotten to understand these problems very well"?

A Well, I would think I would say something like that, yes.

Q And mean it?

A I don't know. I don't know what the context of what we were saying, but I would normally say something nice to lawyers.

Q Mr. Dann, did you understand when you were signing this affidavit that you were making a statement under oath?

A I do.

THE COURT: And you did at the time?

THE WITNESS: I did at the time.

Q And you believed what was in this affidavit at the time as being true?

A I have so stated.

MR. HRUSKA: I would like to offer that affidavit in evidence, your Honor.

THE COURT: Just to eliminate any question, the offer is acceptable.

xxx (PX908 was received in evidence.)

Q Do you agree, Mr. Dann, that there is a present

need in network programming for more musical variety programs?

A I certainly do.

Q And if the talent were available to sustain such programs, you think it would be in the best interest of whatever network could retain the services of that talent to do so and to produce more musical variety programs?

A Absolutely.

Q And do you agree that if for some reason other than the ability to obtain such talent a network could not produce a musical variety program, whereas its competing networks could, that the network which could not would be at a serious competitive disadvantage?

A Absolutely.

Q Now you talked about the roots of musical variety talent dying out, the mountains, the clubs, and you also referred to what? It slips my mind.

A Vaudeville.

Q Vaudeville. I am sorry.

MR. TOPKIS: Burlesque, also, I believe.

Q Is it your view, Mr.Dann, that those are the only realistic sources of new talent to sustain musical variety programs that we can expect ever again?

A Well, there was burlesque. I left out burlesque

because I didn't think it would come back.

It is not impossible for a great start to happen, but they must have a platform first to learn and then to be exposed.

If we had variety shows like we had in early television, let's call it the comedy development hour, or the Steve Allen, where they brought in young people and just did sketches in intimate hunks, fine, but they seem to be dying out.

Even Laugh-In which went on the air, when , '67 or '68, was an open form, which gave spawn to Goldie Hawn.

I can remember having Goldie Hawn in a situation comedy as a walk-on and one of the key executives of CBS said, "Get rid of her, she's just dreadful." And we fired her off the pilot and that's because the film form didn't permit her to function.

She got to Laugh In and she was able to sprout wings.

It is possible that there will be some sort of a proving ground from an open form variety form, but if you look at the last two or three years of the new programs that have gone on, what few they were, they don't do those kinds of shows and I suggest that they don't do that kind because it costs from twelve to $15 million to program an

hour over the year and it is like casting an unknown in the lead of Ceasar and Cleopatra,when they were making it in Europe.

I mean, they don't play for those stakes. You have to give young comics a chance and remember I stress comis, because nobody is interested in singers. Comics are king in television or any other place. That is the big attraction, not in the club, but I mean, comedy, comedy has to be nurtured and developed and the only comics we are getting up today is what started as the Mort Sahls, but they are all the monologist, guys who can't do sketches. They just come on and do social satire and different kinds of whimsy and I don't think that is a broad enough base.

Q Mr. Dann, whoever heard of Sonny & Cher in 1962?

MR. TOPKIS: '62?

A Oh, I --

Q You had heard of them?

A No. I referred to them, to Sonny & Ch

Q I know you did.

A And the reason I referred to them, because they were so atypical and even when CBS scheduled them, they didn't put them on in the fall. They were a summer replacement, I

mean a mid-season replacement and I suggest to you, or a summer replacement, when on occasion you don't --

if you follow the summer schedules on the networks, they don't spend that kind of money normally for summer replacement programming.

They just come through a difficult period of cutbacks. They may be going into another one if the market continues, perhaps, but the chance for variety experimentation for the sake of variety experimentation is essentially fround upon so I am suggesting that the only avenue that these stars, future stars of tomorrow can be developed-- Sonny and Cher, which came on three years ago were already fairly good attraction. They played around already and they were--

Q Played where?

A They played around already, all over, a lot of clubs.

Q Clubs?

A Broadway, lot of television shows.

Q Las Vegas?

A Oh, yes, first rate. Las Vegas, the big one.

Q Why aren't the clubs that now exist, why aren't the summer replacements, why aren't the specials, put on to spotlight some new star like Lili Tomlin who had a special the other night?

Why isn't all of that a basis, a new root, for potential music variety talent?

A Because everything you mention, Mr. Hruska, is the big time and I don't care whether it is in this courtroom or

an editor of a newspaper or a painter or a musician, you openin Carnegie Hall and you are in big trouble because you have to be developed and trained and nurtured.

In the early days of television, a man by the name of Bill Gibson was a writer. He wrote a program ten times that Fred Coe, the producer, through back as being unacceptable.

When it finally went on the air, it was the Miracle Worker with Patty Duke and before that, Bill Gibson had never written a single drama for television.

The point I am trying to make is that the era of live television and the era of the living theatre in the mountains or on Broadway or in the clubs, just like jugglers and acrobats are developed in middle Europe, not because of the weather, or in Russia, but it is because they developed them. The jugglers came from there and we don't have a place to bring up our jugglers.

Now, you can say, well, what the hell, the jugglers can come to Begas if they are good and they can go on the specials. Only after they have hit the big time.

You go to a booking agent in Las Vegas today and tell him that you have got an act that you think can really come along, you will be thrown out of the place.

Now, they have changed this month, in the last

month, to be fair to your question. They are starting to book rock acts in Las Vegas for the first time and they are starting to do big business with them.

And if you extend your premise on what I would call more pragmatic things of what is happening right now in the business, the rock acts, if they become popular enough in television over the next four or five years, do have a breeding ground.

I just don't believe, and maybe it's because of my age, over 50, that the rock acts are visual enough to catch on for the whole family audiences. I think they are essentially a very specialized group but yet, in Las Vegas, they are looking at them.

Q As I net through all this, Mr. Dann, and correct me if I am wrong, you are saying that Las Vegas is not a good breeding ground for talen adequate to sustain a musical variety program because by the time people get to Las Vegas, they are already big hits.

How do people get to Las Vegas? Don't they have to go through the clubs and go through the other roots of show business to get there?

A Well, if you would like now to get into a discussion of Las Vegas, if you are using the word Las Vegas, you are talking about ten hotels. Let us use the phrase, the

ten hotels of Las Vegas.

The ten hotels of Las Vegas today are populated by everybody on the Milton Berle testimonial dinner from last night.

Sure it will be Sonny and Cher, that's a very big attraction there and it's not Tommy Smouthers anymore, he's through.

It's Allen King, it's Danny Thomas, it's Uncle Milty, it's Sinatra. It's that whole list.

But it's not anybody coming up. The geriatric representation in Las Vegas is not to be believed.

Q Mr. Dann, you talked before about the enterprising nature of CTN's ability to react to problems, to solve problems.

If there is as great a need as you have described for musical variety programs and the talent which can sustain those programs, don't you believe that there is some good possibility that those programs will be forthcoming in the future?

A I spent my whole adult career in television answering that same question to the president of the moment at both NBC and CBS. All of them, who have been dedicated to bringing on more live variety programs, the great curse of our business.

They had, for reasons different than you are talking

about, they had live tape stages, real estate investments, programming balance and I kept coming up with cops and robber films and situation comedies and the management of CBS quite correctly pressured me for many years to please try and develop some and you occasionally came across a Smothers show and eventially a Sonny and Cher but it was nothing like in the fifties when it was whether Doris Day or Bob Hope or even a Dan Daley or a Bolger or Jimmy Durante. We ran through 50 years of musical comedy acts in six or seven years in television.

Q Wasn't there another period, Mr. Dann, in which musical variety programs hit a very low level?

A Not like today.

Q Well, but a low level relative to the level it had been prior?

A All of show business, Mr. Hruska, is cyclical, all of it, and we always have highs and lows. There is good-bad drama, bad drama, cops and robbers. We go through whole western periods.

But in the end, if you really watch the charts, you will see the attrition taking place on the variety form as being something that everybody in the network television program departments and its management resents and will do anything--well, I would say seem to, would do anything if they

could buy, quote, a hit, but you have to remember the key thing you have really come upon something that I think is critical to the discussion you are holding, is that why don't they gamble, if that's true, if they want the live variety shows, why don't we have the CBS comedy hour presenting 50 bright young people.

They don't.

It's 12 to $15,000,000. The profit swing would be unbelievable in the evening if that flopped.

The problem of developing--

Q Excuse me. You don't get that kind of swing on a special, do you?

A Well, nobody is going to put up $600,000 to build up an unknown.

Q An unknown, no. No. No, nobody would do it for an unknown but they would do it for a Lili Tomlin, wouldn't they?

MR. TOPKIS: For who?

MR. HRUSKA: Lili Tomlin.

MR. TOPKIS: You will forgive me. Is she a known?

MR. HRUSKA: Apparently not to you.

Q Are you aware of a program recently put on on CBS featuring that particular young lady?

A I was.

Q Did you like the program?

A All right. I would suggest to you that will be the last of Lili Tomlin specials but that is a subjective reaction based upon the rating but that's not an adequate--

Q Mr. Dann, have you talked to anybody in the CBS program department in the last two and a half years regarding musical variety programs and plans for musical variety programs or efforts being made to develop them?

A Yes.

Q With whom?

A Do I have to answer yes about private conversations with people?

THE COURT: I think I will have to ask you who you talked to. You may not have to get into the substance of it.

A I think over the last three years I have talked to all ranking officers of the CBS program department. Mr. Silverman, Mr. Lafferty, Mr. Siegelstein, Mr. Katz--

Q Mr. who?

A Oscar Katz--about A, programming, and B, the problems that they face.

Q Regarding musical variety programs?

A Yes.

Q And all of these people are people with whom you have discussed the question of musical variety programs?

A I have--if I ask them how the Sonny and Cher Show did last night, which I might have--I mean the question, I didn't have this Talmudic discussion we are having with them. I mean they move a little further along, whether the show worked last night. I would suggest to you that any discussion I had with them was not a broad--well, they might say, you know, we can't get any variety shows, it is a mess, or something like that, but really they don't have time. We might meet on a plane or in a bar.

THE COURT: These were not planned discussions or discussions in depth.

THE WITNESS: No.

Q Were they discussions concerning the efforts being made by CTN to develop new music variety programs?

A No. Absolutely not.

Q Were they discussions concerning the plsn of the CTN program department?

A Never.

Q Concerning musical variety programs?

A These discussions never touched upon any future planning activities of any programming at CBS.

Q Mr. Dann, I would like to return to the assumption

that, for some reason which we will not get into now, the producers of CTN programs were unable to use a substantial amount of the ASCAP and BMI music which they desired to use.

Now, would that create a situation in which many performers, especially the stars, would simply refuse to perform on the network in view of the artificial restraints placed on their artistic creativity?

A Since I know of no singer that only sings three particular songs or ten or twenty, I must assume that singers would continue to perform and express their artistic integrity by selecting music of their choice without a problem.

Q Under these circumstances?

A Yes.

THE COURT: I take it--

A The choice would be restricted but they still would.

THE COURT: To put it in a few words, you do not think, then, that the situation assumed by Mr. Hruska would substantially interfere with the ability of CTN to get people to sing on CTN?

A No.

Q Have stars like Tom Jones and Johnny Cash insisted on extremely short production schedules and equally short

notice of the songs they will perform?

A Was there a question there?

(Question read.)

A What do you mean by short notice and short production schedules?

Q Well, I would like to refer your attention, Mr. Dann, to page 3 of your affidavit, paragraph 5A.

I will ask you to read that paragraph in context.

THE COURT: With both authors here we really ought to be able to figure out what it means.

A Yes, I see what I have written or what we have written.

Q Would you agree with that statement as a general proposition?

MR. TOPKIS: What statement as a general proposition?

MR. HRUSKA: The one that was read to him a few moments ago.

THE COURT: We didn't hear it well. Would you read it to us, please, Mr. Dann or Mr. Hruska?

Q Stars like Tom Jones and Johnny Cash have insisted on extremely short production schedules and equally short notice of the songs they will perform.

THE COURT: And the question is whether Mr. Dann still agree with that statement?

MR. HRUSKA: As a general proposition, yes.

A Well, I think that the bargaining power of performers today, live performers today, is substantially less than it was three or four --

THE COURT: Are you saying that the statement you did feel was correct at the time it was made and you feel there have been changes in the situation?

A I certainly think that the business has changed in the last three or four years substantially enough to make me question that statement now.

THE COURT: But you did believe it was accurate at the time it was stated?

THE WITNESS: I did, oh,yes.

Q Weren't you very particular about this affidavit, Mr. Dann, about the accuracy of this affidavit when we went through this?

A Not that I wasn't particular but that week was one that I was in the midst of changing jobs and having left the great corporate world after 2[illegible]-odd years and having received some publicity on my departure and knowing my normal disinclination to become involved with lawyers, and that being well known as CBS, I would suggest toyou that it was not possible that I was careful, very careful, about anything legally.

THE COURT: So far, however, you haven't said that you really disagree with that. Are you saying, Mr. Dann, that, because I know that you are a careful man, and this is part of my own actual experience with Mr. Dann, that perhaps under other circumstances you m[illegible]ht have been even more scrutinizing of this document and so on than you actually were?

A That is an accurate assumption.

Q Mr. Dann, do you remember how long we spent on this affidavit?

A No, I don't.

Q Do you remember going off into a room on your own and reading it and do you remember coming back into my office and discussing it for some considerable period of time?

THE COURT: Well, Mr. Hruska, I really question whether you need to cross examine Mr. Dann on this, because I don't think that he said he disagrees with the statements you asked him about so far.

MR. HRUSKA: I understand that.

THE COURT: At least I don't take that as his testimony. If he gets to a point where he says he really didnt' mean what he said regarding this, then I think it would be worthwhile to go into it.

MR. HRUSKA: I think that is right.

A I want to make it clear, though, Judge, that I do feel that I would not have signed anything unless I believed it and I am sure that I believed this at the time and --

THE COURT: That is why I don't think Mr. Hruska needs to ask you how long you studied it.

Q You said something before about the situation has changed in terms of the bargaining power of the star and of

course in this affidavit specific reference is made to two stars, Tom Jones and Johnny Cash, who are used as examples.

Do you believe that a star performer who today has the ability, talent, to carry a musical variety program on network television would not have the same bargaining power that stars like Tom Jones and Johnny Cash had in 1970, so as to enable them to insist on short production schedules and short notice of the songs they will perform.

MR. TOPKIS: Now, these stars who can carry such a program, are we now referring again to the much discussed Carol Burnett and Sonny and Cher?

THE COURT: We will leave it to Mr. Dann to see whether he feels there are comparable people today.

MR. TOPKIS: Well, there is nothing in this affidavit, your Honor, about Tom Jones and Johnny Cash being able to carry programs. At least nothing Mr. Hruska has --

THE COURT: Well, Mr. Hruska properly asked this question in view of the fact that Mr. Dann stated that he believed there had been changes in bargaining power since 1970 and the assumption I went on and I assume Mr. Hruska did is that Mr. Dann means that there are such comparable people today but their position is different.

Why don't we just let Mr. Dann answer the question.

MR. TOPKIS: Fine.

A I think that the variety picture, and I am speaking with some knowledge, having met with all variety producers, almost, of stature in Hollywood last week, is such that the number of acts that you go around to play the number of shows has remained relatively constant for the last three or four years but the number of shows that they could go on has dropped substantially.

That is why you will see tons of major stars now walking on shows like Merv Griffin, Mike Douglas and Johnny Carson, that the number of chances for a good singer -- you know, in the old days, we used to have six or eight variety shows on a week for each network and they used to book them all in the spring and everybody would -- they used to have a week's protection on either side and you couldn't be on any other one for a week before or a week after and everybody would book the whole season, Hal Kemp was a chief booker, Sidney Paramount, these were great men taken from the Loew's theater circuit, who booked the shows, but they used to tell me then and they used to grade every performer, there are 40 No. 1's, 300 No. 2's and it was just like a supermarket. Everything was, you know, rated and they could move up or down, of course, every year and they probably changed them constantly or impulsively but they used to say, you know, it all depends how many houses you have,

how many theater houses. They used to talk in legitimate theater terms.

But when you drastically cut down the number of places that these artists can perform and, remember, they all like to do television, the best money, the easiest, the cleanest, they know everybody. They don't have to leave Los Angeles, the people in the commissary know heir special meals, the CBS facilities are magnificent in Hollywood, much better than any theater in the United States and it is a joy to work there for an artist.

So, they all come in and want to work. And now when they only have two shows to work there, two programs in all, their bargaining position is not quite what it was and whatwe have now is a round table of, and this is partly because the television people think it is effective, of people coming from different shows to come on somebody else's show because they are television people.

Television people as you know, are national popularity, everybody knows about people on Maude or something and,t ehrefore, the reason that the situation is changed from the Tom Jones, Johnny Cash example, and I must say in retrospect both are very good examples but I am willing to assume responsibility for that, but if we picked No. 1, because neither one was a No. 1, even then, they

were both very limited performers, both doing commercials, practically, today, so that if we had picked say Lucy Ball and Carol, as you could have, and we probably should have, today Lucy and Carol don't have quite the clout even that they had before because when they go on somebody else's show, as I said before, that producer pretty well decided the ground rules and when they come on her show, Lucy and -- you know, I told you how a variety show is put together, so the hypothetical situation or the situation that happens is one out of a hundred that a short production schedule, which we addressed ourselves to, doesn't happy too much now.

For example, the whole period of production has drastically changed from the period you are talking about, as the number of repeats go, and when the people go on, and I would suspect that the protection policy that was in existence for example four years ago which is as important as anything you can imagine. I mean it is like the safety factor in new cars, that protection policy about not competing, letting you go on for a week before or a week after, and it may have been dropped by now, I am not knowledgeable about that and somebody should tell you, but that alone, if they dropped that protection it would quadruple the potential that could go on the new limited amount of shows.

Just like they used to have only one advertiser in a half hour and nothing before or after competitive and how you can have competitive products in the same show.

There is no protection.

So I am saying that network broadcasting, and thank goodness, because it has kept the networks alive and well, which I think is a very important thing in our society, that they have been able to change the commercial pattern but at the same time in the economics o variety shows, the way it has thrown people in the hands of the few existing variety producers, not the network -- the network doesn't have this power. The variety producers, Bob Banner, Joe Hamilton and the Kids from Sonny and Cher who I met with are all, they are the ones who are the ones who have the power to determine what the Johnny Cashes of today do. Nobody else.

Q You have told us, Mr. Dann, that only a top performer I think can sustain a music variety program. You have told us that --

A A top comic.

Q Top comedy. Is Sonny and Cher only comedy?

A Well, they do sing but they sing like Carol sings. They don't -- they don't -- I wouldthink that if you met Burns and Blye, they are producers, they would like to call it a music program.

THE COURT: Singing is secondary?

THE WITNESS: Singing is secondary. The thing that made it successful, particularly Cher's unbelievable comedy antics.

Q Aren't most of these programs though manned by very versatile people who can sing, act, play comedy and --

A Oh, yes, absolutely. Multifaceted.

Q Okay.

Now let me start back down the road. We need a person like that to sustain the program. There is a great need for programs of this nature. Assume that one, two, three new stars might, despite your gloomy predictions, might appear on the horizon capable of doing this come up through the new routes, wouldn't those stars be able to command the sort of flexibility, short notice, et cetera that

you were talking about in this affidavit?

THE COURT: It seems to me, Mr. Hruska, you are defining your own situation. If you ask the witness whether if he assumes that there is such a person as described in the affidavit he wouldn't be such a person as described in the affidavit I think we would all have to admit, yes. Isn't that really what you have asked?

MR. HRUSKA: In essence.

THE COURT: So you are really asking, aren't you, can't it ever happen again?

MR. HRUSKA: In reality, yes, your Honor.

THE COURT: And I think that is a question --

THE WITNESS: That is a very valid question, and I think that is the point that the networks are trying to accomplish, Mr. Hruska, they really want to turn it around.

But I must say that my -- it isn't quite like the energy crisis where we have a crisis and you are going to apply new techniques and come up with -- it is like the writing field, or the painting -- painters from the Rennaissance era, or from the south of France during a particular period, or the writers from Emerson and they, you you know --

THE COURT: The transcendentalists?

THE WITNESS: Yes. In a short period. And it is very difficult to repeat that pattern. You see the one problem we have facing with the perpetuation of the live variety form on tape is how you are going to bring it about. And no money, and no amount of just talking about it is going to do it. It is going to require very, very complicated applications and you say, well, by George, the networkds are so aggressive and sure they will do it, but networks are fairly prosperous now and they are doing very well. And you can't, in a program meeting, Mr. Hruska, if you were in with, NBC, CBS program board they would say you are right we should have it now, let us run the films and which ones we are going to put on the air this fall because they are in the business of putting on shows immediately. I can tell you the pressures of getting shows on overnight. As good as they are it is rather horrendous. And people do suffer some personal inconveniences from time to time. And as a result we are not really talking about the noblest aspect of broadcasting, keeping new shows alive, or the documentaries, or even football games. We are talking about another facet of make believe entertainment which we all believe in and incidentally can be very satirical and productive in today's society. But there is no overriding drive at the networks to change this program

form.

They have fairly well liquidated the tape studios. They have gotten rid of practically everything in New York except one that I recommended they buy and we shouldn't have. I mean it is not negotiating point we go back to. But now if you want to do a show in New York they say no you have to go to the coast, you don't even have a choice. But I think those problems, the drive for live you know is not an overwhelming drive. You are talking about this whole live variety thing, that day will come again, because it must.

I never heard anybody say it must.

Q The point is, Mr. Dann, you say it is not going to happen?

A Only because the natural factors to bring it back aren't in existence. Nobody is jumping up and down crying for it, not even the public, which is an indictment, maybe, of the public.

Q How do you know the public does not have a great interest in having new musical variety programs put on television? How do you know something like that?

A The way the broadcasters look at it is -- and have to look at it -- is how are the ratings this year with less variety shows, and I suggest to you the ratings are very satisfactory.

THE COURT: You mean overall ratings?

THE WITNESS: Yes.

Q If all the networks are down to two or three or four variety programs that are still commanding sufficiently high ratings --

A Fine audience, great audiences.

Q -- to stay on the air, how can you conclude as a matter of logic that the ratings obtained by other programs indicate public disinterest in musical variety.

A I didn't suggest to you the variety shows we have on the air aren't great. As a matter of fact, I will

suggest to you that the Carol Burnett, Sonny & Cher ratings today, those two hour variety shows, and I think somebody else here could project this rating structure better, but I would suggest they today have the highest average rating of variety shows. I mean, if we take the category of variety shows on CBS Sonny & Cher and Carol Burnett represent the two -- somebody is shaking their head -- I bet it is a fabulous year, because there are no bombs as variety forms go. You know, we used to have losses, shows that were down in ratings sometimes in the variety form, which would bring the other ones down. But I am saying they may not be as high as Ken Murray or Jackie Gleason, but at the time those shows were on there were other shows to bring them down.

But as a group these two shows, to prove your point, are very popular.

What I am saying is the rest of the CBS television schedule is highly functional this year, probably doing the best job -- one of the best jobs in its history, an extraordinary --

Q Mr. Dann, it is competing with other non-musical variety programs.

A Yes.

Q I simply do not understand the basis for your

for your opinion which you have expressed that the public does not want more musical variety programs.

A May I correct the word "want" to "demand."

Q Towhat?

A To demand.

THE COURT: He is correcting the word "want" to "demand." In other words, he says his view is that the public is not making any apparent demand.

Q How does the public make an apparent demand?

A Now you are discussing an inherent problem about audience reaction. I am quite willing to. The public will look at anything they like.

Q Mr. Dann, may I interrupt you, because I believe you are going off the point of the question.

You have expressed an opinion now that the public is not in a position, presently - in a position of demanding new musical variety programs.

A Absolutely.

Q I would like to know what basis you have for that opinion.

A Because the public never demands any form. They don't demand forms. That isn't the way the business works.

You put it on and if they like it they look and

if they don't like it they don't look.

Q By the same token,you would say the public is not demanding detective series?

A They are. They are very popular today. Police shows are very popular today.

THE COURT: You are defining demand in terms of response?

THE WITNESS: Yes.

A You know,Sam Goldwyn used to say you can't pay them not to come.

Q How do you know new musical variety programs would not be popular if they were put on and if they had the talent to sustain them?

A I think they would be. You are quite correct. I dnn't disagree with that. If they had talen to sustain -- if they had the talent to become popular and the talent to become good they would stay on. That is quite correct, that's right.

No one says the variety form is not a good form. No one says it cannot work. No one says the public does not like it. They love it. I have suggested to you that two CBS shows are very popular.

What I am suggesting to you is nobody is experimenting, gambling on new program forms, and I am

suggestingto you that the reason they are not is because there seems to be no lifeline from which they spring.

Q How do you know that no one is now in the process of gambling on new musical variety forms or programs? What is your basis for that statement?

A How about trends? I would suggest to you the fact that CBS has only two variety forms --

Q On the air?

A -- on the air, and they will put --

Q Is that your basis?

A No, no. They will put a third one on, I am told, and I am quite familiar with what it is, because it has been announced in the paper and I know who is producing it and I talked to the producer about it, but it is a spring replacement probably that they don't think will probably work very long --

Q How do you know they don't think it will work? What is the basis for that statement?

A None. I think they think it will be a smashing hit and I think it may work and be a tremendous hit and then conceivably CBS -- I don't think so, because the show -- I don't know if the schedules will be set in time. I would suspect that at this point there will be two variety

shows onthe air next fall on CBS. I may be wrong. I don't know that.

Q Mr. Dann, you may have your opinion.

MR. TOPKIS: If your Honor please, just in the interest of terminating this within our collective lifetimes, we have spent a half an hour over whether they are going to have two or three variety shows ever. Does anybody really care? Suppose they do?

THE COURT: I am sure that the plaintiffs care and I think there is some relevance to it. However, I really believe I have Mr. Dann's views and I think I understand the premises for it and I think you are free to attack those premises or put other witnesses on who will give me a different point of view.

MR. HRUSKA: Yes, sir. My only intentinn, your Honor, was to make clear on the record what the basis for the opinion was.

THE WITNESS: I may suggest one point that I think we haven't covered, and that is you can be sure that there is no additional leasing or creation of additional studios for variety programming and that in the recent years there has been, whenever possible, the tendency or the specific action of eliminating studios in which variety programs appear, particularly in New York.

Now, obviously CBS-Hollywood doesn't close studios within their own plant, but they do, they did here in New York.

Q Mr. Dann, what is the basis for your statement that facilities capable of housing productions of musical variety programs are being closed down?

A What is the basis that they are being closed down?

THE COURT: What is the basis of your saying it, what knowledge.

Q You just expressed that opinion. What is the basis of that?

THE COURT: I don't think it was an opinion.

MR. HRUSKA: It was a statement of fact.

THE COURT: Yes.

Q What is it based on?

A I would say that in New York City in the last seven or eight years that television studios as far as operation and existence have dropped substantially as far as the networks are concerned.

Q Do you know whether or not any dimminution in facilities in New York City have been made up by or more than made up by the opening of facilities on the West Coast or the opening up of facilities on the West Coast that pre-existed and are now being used or could possibly be used for musical variety programs?

A I know of none. I know of none.

Q You know of none, but you don't know that it hasn't happened?

A Well, I know that no network has increased studio facilities.

Q Do you think that the lack of available facilities is a factor which would impede the development of new musical variety programs?

A Absolutely not.

Q Do you think that producers of musical variety programs would tolerate conditions imposed by the network which would result in their inability to attain rights to use a substantial amount of the ASCAP or BMI music which they desired to use?

THE COURT: I think we have been through that line.

MR. HRUSKA: We talked about the stars. Now we are talking about the producers. That is about the last question on this line that I will ask.

THE COURT: All right.

THE WITNESS: Can we adjourn for a minute?

THE COURT: Sure.

(Recess.)

MR. HRUSKA: I would like to withdraw the last question.

BY MR. HRUSKA:

Q Mr. Dann, you said on direct examination that you were aware of the fact that television networks license music from ASCAP and BMI on a blanket basis. Do you recall that?

A I do.

Q Do you know the basic features of a blanket license?

A I do not. Well, I don't--I know what it means, yes.

Q Could you give me your understanding of it?

A For a fixed amount of money, which we paid to ASCAP and BMI, we had an unlimited use of their library.

Q Do you know whether music publishing companies compete amongst themselves on a price basis in the licensing of performance rights to television networks?

A I don't know how they function at all. I am sorry.

Q Do you know anything about the commission of the music publishing business?

A Nothing.

Q Do you know anything about the economic insentives of the music publishers to preserve the present ASCAP licensing system?

A I do not.

Q Do you know anything about the concentration of music publishers?

A I do not. Well, I do know from titles and things--

Q Excuse me, sir. I do know that there are major companies who we did a lot of business with.

Q Do you know anything about the percentage of--

A No, sir, I do not.

Q Let me just finish the question so it is clear in the record.

The percentage of performance rights, royalties, that are achieved by a given number of the top music publishing companies?

MR. TOPKIS: If your Honor please, couldn't we go on--I didn't ask this witness anything about these subjects.

THE COURT: There were some questions you asked that were in relation to Dr. Fisher's testimony. I don't know if my geiger counter is working or not, but I assume that Mr. Hruska is trying to show what the limits of Mr. Dann's

background are in the economic field.

MR. HRUSKA: Precisely.

MR. TOPKIS: Iwill stipulate that Mr. Dann is not an economist, at least not to my knowledge.

THE COURT: I think a few questions of this kind are all right. I agree with you that you didn't ask the questions and Mr. Dann didn't purport to indicate that he had any such knowledge.

MR. HRUSKA: Was there an answer to the last question?

THE COURT: It was answered while you were asking it and I assume that that answer stands.

Q Do you know anything at all about the interests of the writers of music in preserving the present ASCAP system?

A I do not.

THE COURT: Can't we just ask one overall question about that?

Do you have any special knowledge with regard to the motivations of any persons to preserve the ASCAP system?

THE WITNESS: No, I do not. But I would suggest to you that the reason I appear ignorant is because such information, if it did exist, which I do not assume it does, but since you are asking a question, I presume somebody thinks it might, that I would never have access or know about

such things because in my job at the network they would never discuss such things near me or in front of me. I would be separated from it.

Q Do you have any knowledge regarding the interests or predilections of writers of music with respect to direct licensing by music publishers without writers consent?

A None.

Q Have you ever heard of an organization called the American Guild of Authors and Composers?

A I have.

Q AGAC?

A Yes.

Q Could you tell me what you know about AGAC?

A I may have given out some awards at their dinner or something.

THE COURT: Now, I do begin to agree with Mr. Topkis that it isn't necessary to bring out what Mr. Dann knows about AGAC. I don't think there was anything he testified to that it seems to me would be substantially influenced by what he knows or doesn't know about AGAC.

MR. HRUSKA: Your Honor, the witness did express opinions regarding the inclination or disinclination of writers and publishers to deal with television networks in the event of a by-pass. The purpose of this line of

questioning is to demonstrate that the witness knows nothing about the economic incentives of the industry, music publishing and writing industry--

THE COURT: I think he admitted that, if that's the word you used.

MR. HRUSKA: Yes. --and no, sir, nothing about the original set up of the industry which might be brought to bear on the question of inclincation or disinclination to deal.

THE COURT: Let me say this: Unless Mr. Topkis brings out anything on redirect to show that Mr. Dann has such knowledge, I assume he does not.

MR. HRUSKA: Right. I do too, your Honor, obviously, but I just wanted to establish the record.

THE COURT: All right.

BY MR. HRUSKA:

Q Mr. Dann, I would like to read quickly through a list of names and ask you whether you know who these people are one at a time. If you say no I will go on to the next name.

Harold Adamson?

A No.

Q Eddie Beal?

A No.

Q Gene DePaul.

A No.

Q Ray Evans?

A When you say know, personally, you mean?

Q Yes.

A No.

Q You know who they are?

A Yes.

THE COURT: I am a little unclear. Did you know who the last one was?

THE WITNESS: Yes.

THE COURT: You know his reputation?

THE WITNESS: Yes.

THE COURT: Is the question whether Mr. Dann knows them personally or whether he knows them by reputation?

MR. HRUSKA: Who they are, yes.

Q Did you say yes to Ray Evans?

A I think he is a composer. I may be incorrect.

Q Sammy Fain?

A Yes.

Q You know that he is a composer?

A I do.

Q Do you know his reputation? Is he, as far as you

know, a composer of some standing?

MR. TOPKIS: Is Mr. Dann a character witness? What is this?

THE COURT: It is obvious to explore Mr. Dann's knowledge of who composers are and what their standing is within their profession.

MR. HRUSKA: Exactly, your Honor.

THE COURT: Can't we do that with a general question again? Why don't you just ask Mr. Dann if he professes to have any information in that regard. If he says yes then let's explore it. If he says no then we don't have to go through all this detail.

MR. HRUSKA: Could I perhaps suggest one other alternative, and that's let me read the entire list, which I can do in about 30 seconds, and ask Mr. Dann a question about that list as a group.

THE COURT: All right.

t6 pm

Q Ray Gilbert, Donald Kahn, Moe Jerome, Paul Webster, Jerry Livingston, Mimmy McHugh, Johnny Mercer, Vic Mizzy, Don Raye, Harry Ruby, Harold Spina, Harry Tobias and Ned Washington.

Are these people, Mr. Dann, whom you believe by virtue of whatever you may know about these people to be songwriters of the first rank?

A Yes, sir.

THE COURT: Those of them you know.

THE WITNESS: Yes. Yes, sir.

Q Thank you.

Now, I would like you to assume these facts:

In 1964 the Minnesota Mining Company, which I will call 3M made a decision --

THE COURT: Why don't we get the objection now? There is no point your spinning outa whole hypothetical.

MR. TOPKIS: Whatever it is I am against it.

THE COURT: Well, I know that. While I understand what that means in Topkis' would you please explain it in court for the Court of Appeals?

MR. TOPKIS: If your Honor please, if you understand what I mean and I understand what I mean then I am fine. I don't care about anything else. But seriously what can this man add to your knowledge of the --

THE COURT: I think there is more to it than that. I don't think the direct testimony warrants any inquiry wity regard to Mr. Dann's reaction to the 3M situation.

MR. TOPKIS: And if your Honor please, you know what that long list of songwriters means --

THE COURT: Quit while you are ahead.

MR. HRUSKA: I would like to ask Mr. Dann a series of questions, including questions based on the 3M incident, to determine --

THE COURT: Just a minute until I hear what Mr. Hruska wants to say.

MR.HRUSKA: -- to determine whether these facts brought to his attention would influence the judgment that he expressed this morning regarding writers willing to deal directly with CBS in event of bypass.

THE COURT: I will tell you what I would like to do, I don't want to wait a long time but I would like to have you write out what your proposed question is so that I can see whether I agree with the description which you make of the situation and say, Mr. Dann,if you know that would it influence your judgment as expressed this morning. I am not trying to make school boys of any of you but I think it gets to be too diffuse otherwise.

If you want to take five minutes to frame a

question -- unless you already have it.

MR. HRUSKA: I have it here, your Honor.

MR. TOPKIS: It is all written out in advance.

MR. HRUSKA: Well, not completely.

THE COURT: Mr. Dann wants to ask a question.

THE WITNESS: I have an appointment at some point this afternoon I cannot break. Who do I ask?

THE COURT: It is proper to ask me at least in the first instance. What time is your appointment?

THE WITNESS: At 5 o'clock.

THE COURT: When do you have to leave here to get there?

THE WITNESS: Well, it is at 57th Street and Madison Avenue.

THE COURT: If you left here at 4:15 would that be all right?

THE WITNESS: Thank you, sir. Thank you very much.

MR. HRUSKA: I have no objection to that.

MISS KEARSE: Your Honor, could we look at the question too?

THE COURT: If I approve it you look at it. If I disapprove it you don't care. All right?

MISS KEARSE: I thought maybe we could influence the

decision.

MR. HRUSKA: I was going to briefly describe --

THE COURT: All right.

I think I can rule on it this way. Let me ask you this, how much more examination do you think you have beyond that, Mr. Hruska?

MR. HRUSKA: I think the main remaining subject I want to cover with the witness concerns the opinins regarding disinclination, music in the can, advertisements in the can.

THE COURT: Well, I am not asking for a catalog I am just asking you to estimate to yourself first and then to me after you have reached a conclusion, how much longer you think it will take you to complete your cross examination.

MR. HRUSKA: I believe that it would probably take another hour.

THE COURT: Well, then, why don't you go on to something else and we are going to have to call Mr. Dann back, I am sorry to say, and we will let him go at 4:15 and you can develop the proposed hypothetical question as completely as possible overnight and give it to me the first thing in the morning and copies to Mr. Topkis and Miss Kearse.

THE WITNESS: I apologize. Am I upsetting the

hours of the court?

THE COURT: No, it isn't that. I am sorry we are going to have to ask you to come back because we won't finish today. We finish normally at 4:30 so today we will finish at 4:15.

BY MR. HRUSKA:

Q I would like to read a list of music publishing companies and then ask you a question about that list. The list consists of Warner Brothers, Feist, Miller & Robbins which is otherwise known as the Big 3, Chappell, MCA Music, Edwin H. Morris, Shapiro Bernstein, Mills, Bregman Vocco, TRO, Aberback, Borne, Sam Fox, Larry Shayne, Jerry Vogel. Have you heard those names of music publishing companies or any substantial number of them before?

A Yes, sir.

Q Do you recognize those names as generally being among, or the more substantial music publishing corporations in this country?

MR. TOPKIS: Objection, your Honor. What difference does Mr. Dann's knowledge of this fact make?

THE COURT: I will say I will hear the answer but it doesn't seem to me that what he testified to today was based on the fact that he knows much about the names of companies or anything. He has talked about the

dynamics of buying music and so on. Do you recognize those names as leading publishers?

THE WITNESS: Yes, sir.

Q Now I would like you to assume these facts:

One, approximately 40 per cent --

A Excuse me. I can't hear. I apologize.

Q I am sorry. Approximately 40 per cent of the performance rights income earned by those publishers come from network television. Two, those publishers now supply CTN, on an annual basis, with approximately 44 per cent of the ASCAP music now used on CTN and measured by ASCAP credits.

A 40 per cent of their income is from network television.

Q Of their performance income, from ASCAP.

A Yes.

Q 44 per cent of the ASCAP music used on the CBS television network comes from the catalogs of those publishers.

A Yes.

Q Three, those publishers do not now engage in any price competition for that business. They simply receive ASCAP distributions at the rate of $00 for each feature performance and lower rates for background and theme performances, and their writers, the writers of the music

receive a like amount for each use. Assume further that you were to talk to a representative of each of those publishers and that representative tells you, in words or substance, that he considers the direct licensing of television networkds to be a form of self-annihilation, to be the end of the road for him as a publisher, or in general, that performance rights should be licensed through performance rights of silence. What impact would thcse facts, discussion, have on ycur judgment regarding CTN's abiEity, the ability of program producers to directly license all the music they needed without competitive injury?

MR. T_PKIS: I object to the question on the ground that it does not have foundation in the evidence.

THE COURT: I don't think there is any foundation in the evidence that even if, as apparently was the case, some of the music publishers may have made such remarks to some people some time back in another context they would necessarily make such remarks to Mr. Dann or the person filling his shoes at CTN at thepresent ime.

MR.HRUSKA: I am asking you to assume , your Honor, that such people would make such remarks.

THE COURT: I know that but the objection is there is no evidence to indicate that they would. And I sustain the objection to that extent. I will allow you to ask a

hypothetical based on the statistics that were given and based on the assumption that the persons that youare dealing with indicated to you that they did not favor, or that they did favor licensing through ASCAP and they didnot favor licensing directly.

Do you understand that?

I mean do you understand the --

MR. HRUSKA: Fairly well.

Could I rephrase the question.

THE COURT: I think it would help us all if you would.

THE WITNESS: In essence aren't you -- are you kind of saying that so much of our revenue comes from this source that we want to maintain it? Would that be incorrect?

Q Are these words that --

THE COURT: When you say our revenue are you speaking of the song publisher?

THE WITNESS: As a music publisher. He is saying we have got so much coming in from these fellows let us maintain it.

Q No, that is not --

THE COURT: After the assumedfacts what was the question that you asked?

MR. HRUSKA: The question was, what impact would those facts and discussions, and now the discussions have been modified, to be discussions which --

THE COURT: What impact would the facts and discussions have on what?

MR. HRUSKA: On your judgment regarding the ability of CTN and program packagers to directly license all the music they needed without competitive injury.

THE COURT: There has to be a simpler way to ask an opinion on this proposition. I think that -- well, if you can answer the question youare free to answer it.

THE WITNESS: This is embarrassing. I don't really understand it, Judge.

THE COURT: Well, you don't need to be embarrassed by that. I am not saying it is Mr. Hruska's fault.

THE WITNESS: I don't follow easily. This isn't because you didn't make it clear, either it is late in the day or --

THE COURT: Let me see if this is any better:

If you knew that the publishers derived 40 per cent of their revenue from CTN and if you were aware in your own mind that 44 per cent of the ASCAP music that you used came from these people, and if you knew that they expressly indicated that they would prefer to have their music

cleared through ASCAP on the present basis and not on a direct licensing basis, what impact would all those -- the knowledge of all those facts have on your attitude towards -- towards what?

MR. HRUSKA: Towards the ability of CTN, or packagers of CTN programs, of obtaining the music they wanted to use for the catalogs of those publishers without competitive injury.

THE COURT: But you haven't indicated on what basis they would procure it.

I mean, are you asking Mr. Dann whether he thinks under those circumstances he could get it directly? He could also get it from ASCAP.

MR. HRUSKA: Let us assume he -- I am sorry, I should have mentioned it.

Q Let us assume that CBS television network suddenly drops its ASCAP license, the ABC and NBC television networks continue with their ASCAP licenses, and the packagers of the CTN shows go to these publishers to try to obtain directly licenses.

A What would be -- the question now is --

Q The question is --

A -- how the music companies would react to those people?

Q How the facts and discussions that we have asked you to assume would affect your judgment regarding the ability of the packagers and the network to obtain the rights they needed.

A Well, if we revert back, Mr. Hruska, to the points I made during the day of how music comes to the shows, rather than talking about networkds, or packagers going to them, because that isn't really what happens.

It is really the individual musical director, or line executive on the show that deals with them. I think it is quite possible that you would have one system for one network, or two networks and another system for another network and they would both live alongside of each other.

I don't see them saying, music publishers saying, to hell with you, you are out, all my goodies go to NBC or ABC, because the goodies are not really the goodies you are talking about because there is so much around that they could get in one way or another that I think that the thrust would be, perhaps, I am not sure, I haven't thought about this complicated question, I am still trying to understand it, but it does seem that it isn't necessarily true that that situation you have structured will bring about a lot of hostility on either side.

Q Let me try to rephrase it this way: Not rephrase

the last question but put it to you in a somewhat different perspective.

Would you agree with me, Mr. Dann, that since you do not know the degree to which music publishing corporations and the writers of music desire to preserve the current like it licensing system through ASCAP -- BMI, and their desire to avoid any form of price competition amongst themselves for television network business, that you cannot express an opinion regarding their inclination or disinclination to deal with a television network which is attempting to bypass that system?

MR. TOPKIS: I have to do it but could I have that question back?

THE COURT: All right, will you read it back?

(Read.)

MR. TOPKIS: I submit that that question is argumentative rather than fact eliciting.

THE COURT: I will sustain the objection, Mr. Hruska. If you want to bring in -- I would be willing to have you ask Mr. Dann this question, which seems to be getting at part of it: Mr. Dann, do you believe that there are circumstances under which music publishers might refuse to sell music to CTN?

THE WITNESS: Am I correct that you said that -- oh,

the fact -- no, I would think that refusal to sell to CBS, I have to be careful not to understand any of the -- I don't know any of the legal aspects, I am not talking about the normal flow of business. My goodness, if --

THE COURT: Assuming they legally were free to do so.

THE WITNESS: Well, but they are speaking for their -- can you imagine a prominent composer or even a middle-class composer having his music turned down because the publisher says I won't sell to them?

THE COURT: Well, I understand your answer, your answer is then you don't conceive the circumstance in which --

THE WITNESS: You mustn't assume. And I don't know anything about -- I assume already that I do not know a hundred percent the relationship between the music publisher and the composer, or even the music publisher, the agents of the composer and the agent -- and the composer's lawyer, but I do know that essentially it is impossible for me to believe that if a composer has a chance to work, or, more important, has a chance to have his works exposed, that he is going to get involved with any nonsense about whether or not the music publisher wants to give it to him. He will pick up that phone and either that -- I am not so sure that the music publisher won't be caught in the middle immediately

and the music publisher -- the composer first of all will call the network and get the facts then he will probably call his lawyer to scream at the publisher. I think that is what will happen. I don't think he will sit back and say my publisher speaks for me, I am sorry, whatever he says is fine. If you know publishers they are not that kind of fellow. If they own their own publishing company several of them do make their own decision. But even there I don't think they will hold out. I don't know that much about it.

Q Mr. Dann, do you know whether writers of published music in typical relations with publishers have the right to license their music without publisher consent?

A I am sorry, I do not know.

Q All right.

THE COURT: Well, would your answer be any different if -- depending on the answer to that question?

THE WITNESS. Not essentially. Because I think the composer still would react as aggressively as he can to get his works performed, or the chance to create works.

Q Mr. Dann, how long do you think the CBS television network could hold out if a substantial number of the major publishers and major writers in this country with knowledge to deal with CTN, other than through ASCAP and CTN cancelled its ASCAP license?

A Under the present programming schedule of CBS, I can think of nothing I could live with easier as a program bureaucrat than losing this for the moment, these rights for the moment. I mean if we cancelled them. It would not be a disruptive influence because we would -- there is only two variety shows on the network and I know I could live with one season or two seasons with it. Now if you are saying would it ever have an impact in any other circumstances? It is very hypothetical, but if you are saying, because essentially I think I can't believe in the long run that the fine musicians of the fine composers of the day wouldn't want to work with the No. 1 outlet in the history of entertainment. Here you have the giants of the world in the use of music rights and I think that if there is a difference of opinion that they eventually will want to have their stuff on.

Q Mr. Dann, in your affidavit you did express opinions regarding the putting together of musical variety programs and specials.

A Yes, sir.

Q Do you think in the circumstances I have described where a substantial number of the major publishers and writers with knowledge to deal with CTN, or CTN producers, that you could continue to produce those programs?

A I think today, yes. I sound like a broken record but I suggest to you that in the last three or four years there has been an increased momentum, and at the time I wrote this, or read this, or signed it --

THE COURT: Well, for me to be perfectly informed about this affidavit am I correct in assuming that this affidavit was developed as such affidavits normally are, by responsible people?

THE WITNESS: Yes.

THE COURT: That is that you gave information to Mr. Hruska, he put it in a form which he believed made sense --

MR. HRUSKA: My associate.

THE COURT: Or whoever.

MR. HRUSKA: The format, chronology was that Mr. Lisido who worked with me on the case at the time, worked with Mr. Dann, got information from Mr. Dann --

THE WITNESS: He came to see me.

MR. HRUSKA: Yes, or spoke to him on the phone. I am not sure which.

THE COURT: But in any event I assume you furnished the technical information relating to television which a lawyer wouldn't be likely to know. Is that correct?

THE WITNESS: Well, I --

THE COURT: And he put it in legal form --

MR. HRUSKA: He drafted it --

THE COURT: With whatever degree of care.

MR. HRUSKA: Mr. Lisido prepared the first draft to Mr. Dann through the CBS law department.

THE WITNESS: I am sure that is the way it happened. I am positive.

MR. HRUSKA: I think Mr. Dann may have even suggested changes to Mr. Lisido, another draft was prepared, we had a meeting in my office which Mr. Dann attended, he took further time with the revised copy at my office, we had a further discussion about it and he signed it.

THE COURT: Well, I accept your representations and I don't think that adds very much one way or the other but we have got that out of the way now. Have you finished the answer that you were making?

THE WITNESS: Yes, sir.

THE COURT: Well, I think this would be a good time then for us to quite for the day. And would you prefer to come in early or late tomorrow? I am not tryingto make a special witness out of you but I think you have been worked hard and --

THE WITNESS: I will be glad to come at the discretion of the Court although I have a 3 o'clock appointment

tomorrow that I can't break.

THE COURT: I can't conceive that you will be here that late.

MR. TOPKIS: May I request that we get an earlier start tomorrow? I have Larry Green coming in from the coast and --

THE COURT: All right, let us start at 9:30.

MR. HRUSKA: Miss Preston was scheduled to start first thing tomorrow morning.

THE COURT: She was?

MR. HRUSKA: Yes, your Honor.

THE COURT: How long are you going to take with her?

MR. HRUSKA: Well, we have the remainder of cross whatever that is.

MR. TOPKIS: I have nothing with Miss Preston.

MR.HRUSKA: Then it is simply redirect examination and I assume we can go through redirect examination in 15, 20 minutes.

THE COURT: All right.

MR. TOPKIS: When shall we do her?

THE COURT: Why don't we -- if you don't mind we have a lady too listed before -- get her on right away and --

MR. TOPKIS: All right.

THE WITNESS: May I please arrive at 9:45?

THE COURT: Yes.

THE WITNESS: Is that satisfactory?

MR. HRUSKA: Yes.

THE COURT: Gentlemen, can I see you lawyers for a minute? I suggest 2 o'clock on Friday for the remainder of this ordeal of documentation. All right.

(Adjourned to Thursday, November 29, 1973, at 9:30 a.m.)

PAGE	LINE(S)	ERROR	CHANGE TO
3178	24	PX)19	PX019
3180	10	objecttions	objections
3180	16	list	list and
3181	9	328	428
3183	12	his	its
3183	15	deposition	testimony
3185	23	P. 427,	PX 427.
3186	2	is	are
3186	15	that problem in-erms of the numbers of	(delete)
3186	23	toojection	to objection
3187	9	hole	whole
3187	22	intention	index
3188	23	401	400
3189	15	offer to his knowledge	offer it to the knowledge
3189	16	broadcasting.	broadcasting of
3190	8	difficulty	difficult
3192	16	groundsthat	grounds that
3192	24	on t	on that
3193	6, 11	Musuk	Muzak
3193	16	ground sthat	grounds that
3195	19	have to	have anything to
3196	6	3-M	3M
3197	21	PX432	PX431
3199	13	PX432	PX 431
3206	24	complex, economic	complex economic
3208	14	,I	, I
3208	14	knowhis	know his

PAGE	LINE(S)	ERROR	CHANGE TO
3209	7	isyour	is your
3209	11	because the	because of the
3212	20	Allright	All right
3213	7	toldyou	told you
3213	17	jointed	joined
3213	24	that network	tnat, network
3214	8	'68	'58
3214	15	ibilitys	ibilities
3215	12	Snyder,	Schneider,
3216	5	had	head
3216	9	thananybody	than anybody
3216	14	Gielgud, Ages	Gielgud Ages
3216	20	ninto	into
3216	21	and had	and I had
3217	8	,that	, that
3217	8	insuch	in such
3217	23	fromCBS	from CBS
3218	7	Workshop	Workshop two
3218	9	ofmy	of my
3218	24	whenI	when I
3219	6	place.	place?
3219	16	to	too
3219	19	theydo	they do
3220	2	cinescopes	kinescopes
3220	3	Cinescopes	Kinescopes
3220	4	cinescopes	kinescopes
3221	5	were	was
3221	6,7, 15, 16	cinescopes	kinescopes
3221	20	werein	were in
3221	23	production	production was

PAGE	LINE(S)	ERROR	CHANGE TO
3222	5	perhaps	perhaps that's
3222	8	to the	in the
3222	8	schedule and	schedule, and,
3222	9	figures.	figures,
3222	14,16, 17	west	West
3222	20	on	or
3222	23	programming;	programming.
3222	24	one	One
3223	3	in	with
3223	4	operas, there	operas. There
3223	10	don'tknow	don't know
3223	14	until	Until
3224	22	simplier	simpler
3224	23	of	as
3225	5	run through	runthrough
3225	10	property. Its	property, its
3225	17	there to	that to
3226	20	Production	Productions
3226	20	Artist.	Artists.
3227	23	can't	can
3228	3	stimulous	stimulus
3228	17	anymore	any more
3228	20	to	of
3228	21	industrie	industry
3229	4	Louie	Louis
3229	6	true as	true of

PAGE	LINE(S)	ERROR	CHANGE TO
3229	9	Mypoint	My point
3229	12	shows that is	shows, that is,
3229	20	was	is
3231	9	Division	division
3231	10	Pictures was	Pictures, was
3231	11	$800	$800,000
3231	13-14	FA/and D spends	The R/and D expense
3232	10	were	was
3232	25	Theonly	The only
3233	22	Iwould	I would
3233	25	phenomena	phenomenon
3234	25	annotated	indicated
3236	21	oncein	once in
3237	3	with	were
3237	9	modern museum	Modern Museum
3238	5	Union	union
3238	10	calculations	cost inflation
3238	11	those three	those are three
3238	12	fact	last
3239	6	Mountains	mountains
3239	10	just	(delete)
3239	15	night clubs	nightclubs
3239	23	Smouthers	Smothers
3239	25	Smouthers	Smothers
3241	2	ewe	we
3241	3	Wallie	Wally

3378- 5

PAGE	LINE(S)	ERROR	CHANGE TO
3242	18	andyou	and you
3242	25	bookkeep	bookkeeping
3243	6	would	wouldn't
3244	3	to Sid Ceasar	to see Sid Caesar
3244	7	Paulson	Paulsen
3244	15	air	production
3245	2	now	new
3245	4	start	star
3245	7	so, quote,so they	so they
3245	17	theBusiness	the Business
3245	19	te . . . People	the . . . people
3246	19	sort	source
3246	22	roaming	growing
3247	4	Research say	Research people say
3247	11	,so	, so
3247	12	,either	, either
3247	21	more	fewer
3247	22	business	Business
3248	5	parentheticallythat	parenthetically that
3248	10	and"Trials	and "Trials
3249	6	new	into
(3250 (3262	1	Dana-direct	Dann-direct
3250	17	hat	that
3251	2, 3	in theFamily	In The Family
3251	8	onvariety	on variety
3251	13	thinkthe	think the
3251	20	throug h	through
3252	7	thinkthe	think the
3252	15	,I	, I
3252	19	giving	getting
3253	5	,you	, you
3253	9	,yes	, yes

PAGE	LINE(S)	ERROR	CHANGE TO
3255	13	from using	for music
3255	18	licensing music	licensing of music
3256	5	what	that
3256	24	so	So
3257	12	wants	want
3257	13	affairs department	Affairs Department
3257	15	way: dy	way: Nobody
3257	18	business affairs department	Business Affairs Department
3258	7	Messrs.Wright	Messrs. Wright
3258	10	,sir?	, sir?
3259	5	fromCBS	from CBS
3261	19	thinkthat	think that
3261	22	point,your	point, your
3261	23	.Dann	. Dann
3262	8	of$25,000	of $25,000
3263	9	getsback	gets back
3264	6	ADC on	ABC in
3264	21	comodies	comedies
3264	23	that	that in a
3265	9	Sunda	Sunga
3266	11	You	you
3266	13	shows	show
3267	4	look n	look
3267	9	RexHarrison	Rex Harrison
3267	9	is Judge	is, Judge --
3267	10	Muggs must	J. Fred Muggs, you must
3267	11	Rickels	Rickles

PAGE	LINE(S)	ERROR	CHANGE TO
3267	16	sar	star
3268	11	stop	top
3268	19	Mangowitz	Mankiewicz
3268	20	whose	who's
3268	25	Gavotte.She'll	gavotte. She'll
3269	15	useage	usage
3269	19	bariety	variety
3269	23	happenson	happens on
3270	8	aproduction	production
3272	3	costs 450	costs between 450
3272	12	only	on
3273	5	copywrite	copyright
3273	19	me your	me, your
3274	2	Sipes	Sipes'
3274	2	determine	determined
3274	24	copywrite	copyright
3275	16	Charlop	Charlap
3275	17	Lesser	Loesser
3275	18	Van Hussan	Van Heusen
3275	18	Kahn	Cahn
3276	2, 3	MR. HRUSKA: etc.	DELETE ENTIRELY
3276	8	,in my	, in my
3276	9	Styne. inmy	Styne, in my
3276	9	Kahn	Cahn
3276	10	Sharlap	Charlap
3276	13	them unless	them, unless
3277	6	Sharlap	Charlap

PAGE	LINE(S)	ERROR	CHANGE TO
3277	8	11 --	Ed --
3277	10	was	had
3278	15	say	say,
3278	6	show	shown
3278	6, 7	Copeland	Copland
3278	9	only anxious	only too anxious
3278	9	them	theme
3278	10	Copeland	Copland
3278	11	certainly front	certainly the front
3278	25	NCB	NBC
3279	4	COURT:	WITNESS:
3279	8	eithermake	either make

PAGE	LINE	ERROR	CHANGE TO
3279	13	times	themes
3279	15	another	another another
3279	22	Copeland	Copland
3280	9	perform particularly	perform, particularly
3280	21	dont'get suddenly	don't get somebody
3281	4	withthe	with the
3282	12	side	time
3283	4	performs	performers
3283	17	do.	do,
3283	18	start	star
3284	7	adopt	adapt
3284	17	publishers?	publishers.
3284	24	youhave	you have
3284	25	hasgiven	has given
3285	3	is	has
3285	8	Sipes	Sipes'
3285	13	wouldlike	would like
3286	10	CBS'	CBS
3286	18	create	creative
3286	18	as a	as having a
3287	6	no	any
3287	8	nyamusic	music
3287	9	Coca Cola	Coca-Cola
3287	9	Pesi Cola	Pepsi-Cola
3287	14	court	Court
3287	14	themselves	themselves be
3288	23	musi	music

PAGE	LINE(S)	ERROR	CHANGE TO
3290	3	andyou	and you
3290	23	the night airlines,	United Airlines'
3292	18	$20,000	$220,000
3298	4	i	I
3298	9	creative artists	A creative artist
3299	19	Did	Would
3301	6	enconceivable	inconceivable
3301	18	NBS	NBC
3301	20	Idon't	I don't
3302	21	the	that to
3302	23	less that	less but that
3304	8	Smouthers	Smothers
3304	9	takes	take
3304	17	traction	attraction
3304	22	procedure.	producer.
3305	23	fall, "And	fall," and
3306	4	theman	the man
3306	9	endin	end in
3309	3	andout	and out
3309	7	g o	go
3309	12	threating.	threatening
3310	19	themusic	the music
3310	24	,it	, it
3312	12	theCarol	the Carol
3312	18	assume n in	assume in
3312	21	programs.	programs?
3312	24	wre	are

PAGE	LINE	ERROR	CHANGE TO
3313	2	wan	want
3313	3	substanti-ly	substantially
3313	4	plays	programs
3313	10	inthe	in the
3313	25	form fdied	form died
3314	13	inessence,	in essence,
3314	15	is	was
3314	20	show	Show
3315	6	this	it
3315	7	had	they had
3316	12	larger	large
3317	3	pasttime	past time
3318	2	Cravath-Swaine	Cravath, Swaine
3318	13	doesremember	does remember
3318	16	theCBS	the CBS
3318	18	whatyou	what you
3318	18	whenyou	when you
3318	23	whatyou	what you
3318	24	,"meaning	,"meaning
3321	3	start	star
3321	15	"Glt	"Get
3321	18	Laugh In	Laugh-In
3322	3	,when	,when
3322	3	Ceasar	Caesar
3322	8	comis	comics
3323	2	come	came
3323	6	fround	frowned
3323	8	already	already a

PAGE	LINE	ERROR	CHANGE TO
3324	3	openin	open in
3324	7	through	threw
3324	15	middle	Middle
3324	20	Begas	Vegas
3325	17	talen	talent
3326	7	Smouthers	Smothers
3327	7	eventially	eventually
3329	13	yes	(delete)
3330	19	plsn	plans
3331	4	BMi	BMI
3333	18	agree	agrees
3334	16	as	at
3334	7	,yes	, yes
3335	15	didnt'	didn't
3337	5	you	(delete)
3338	8	heir	their
3338	15	whatwe	what we
3338	19	national	national in
3338	21	and,t ehrefore,	and, therefore,
3339	12	happy	happen
3340	10	o	of
3340	14	Kids	kids
3341	8	wouldthink	would think
3341	9	would	would not
3342	3	COURT:It	COURT: It
3342	22	Rennaissance	Renaissance
3342	22	south	South
3342	23	,you	, you

PAGE	LINE(S)	ERROR	CHANGE TO 3378- 13
3342	25	transcendentalists	Transcendentalists
3343	8	networkds	networks
3344	6	not	not a
3347	5	Towhat?	To what?
3348	3	,you	, you
3348	10	,Sam	, Sam
3348	16	talen	talent
3349	2	suggesingto	suggesting t
3350	2	onthe	on the
3354	2	commission	concentration
3354	5	insentives	incentives
3354	12	I do know that	A I do know that
3355	4	Iwill	I will
3359	5	obvious	obviously
3360	3	Mimmy	Jimmy
3360	17	outa	out a
3360	20	Topkis	Topkisese
3361	3	wity	with
3361	21	,if	, if
3361	21	know	knew
3362	23	THD	THE
3363	9	opinins	opinions
3364	13	Aberback, Borne	Aberbach, Bourne
3365	23	$00	$400
3366	6	networkds	networks
3366	9	of silence	societies
3366	13	Mr. TO_KIS:	MR. TOPKIS:
3367	3	youare	you are
3367	5	didnot	did not

PAGE	LINE	ERROR	CHANGE TO
3367	24	assumedfacts	assumed facts
3368	12	youare	you are
3370	8	networkds,	networks,
3371	7	like it licensing	licensing
3371	13	have	hate
3373	23	with knowledge	refused
3374	12	m[illegible]icians of	musicians or
3374	24	with knowledge	refused
3375	17	Lisido	Lucido
3376	5, 10	Lisido	Lucido
3376	20	quite	quit
3376	21	tryingto	trying to
3377	6	Larry	Johnny

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge.
vs.	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS	69 Civil 5740

New York, November 29 1973

STENOGRAPHER'S MINUTES

* * *

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y. N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

Now, I would like to offer AX 263 and 264 with their sub-lettered subordinate parts.

MR. HRUSKA: We have no objection.

THE COURT: That's it, then?

What are the exhibit numbers? Miss Preston, thank you very much.

xx (ASCAP Exhibit 263 A, B, C, D, E, F and G and ASCAP Exhibit 264 A, B, C, D, E and F, received in evidence.)

(Witness excused.)

THE COURT: I guess we are ready to resume with Mr. Dann.

xx M I C H A E L D A N N, resumed.

CONTINUED CROSS EXAMINATION

BY MR. HRUSKA:

Q Just a couple of preliminary questions, if I may, Mr. Dann.

I have often heard in this industry that it is far more difficult to recoup audiences than to lose it, in talking about a television network.

Does that comport with your experience?

A It is far more difficult to recoup audiences for a program, a single program?

Q Well, single program or, say, an evening's lineup

or a schedule.

A Far more easy to--

Q To lose than to recoup?

A No, I think that is a meaningless platitude. I mean if you talk about recouping, you are talking--if you can't recoup, if it is new programs, if your new program is coming on that night, then it is the gamble of hits and misses.

It is true that since hits are hard to come by, if you lose a hit and it has a function of attracting a large audience not only to that individual program but maintaining the night, the chances of coming up with another hit to replace it, should it decline, is very difficult.

I think on a particular program when it starts to go downhill, to turn it around, if recoupment there means a specific program, then it is very difficult.

Much more difficult than even finding a hit replacement.

Programs that we have been able to rejuvenate you know, primarily, come from changing the time periods to another night and then you can have remarkable success. There has been a great deal of history on that but not typical.

I mean, a show in decline stays down.

Q You mentioned something about a show on a particular evening.

If you have got a strong show in one evening's lineup and the ratings on that program start going down, is that likely to have an adverse impact on other programs in that evening's lineup?

A If it is at the beginning of the evening it has a potential of having some impact. If it is the last program on in the night, it would have none.

Q Obviously, or less.

A However, there are some programs that are immune to lead in. For example, Ben Casey was an absolute runaway hit on ABC at 10 o'clock, Monday nights. The program that preceded it was a disaster and the big audience was with Lucy and Andy Griffin and suddenly the Casey audience was dominant.

I mean, people will often find the show no matter what. Generally, though, it is a fair assumption that it is better to have a stronger show in front of you than a weaker one and it does tend to help you, but it is not universal.

Q Have you made any study or gained any experience which would lead you to arrive at conclusions concerning this specific aspect of audiences viewing habits, and that

is to stay with a particular show that has been a hit, that has run for, possibly, one or two seasons, in preference to turning to a new show on another network in the same time slot?

A Is the question have I given any study to whether people--

THE COURT: Have you studied it or do you know of any studies that reached a conclusion.

A I don't know of the subject.

Q Has your experience enabled you to form a judgment on this?

A On what?

Q On the matter of the audience staying with a hit having a proclivity to stay with a hit and having some inertial resistance to turning to new programs?

A By definition of a hit, a success -- by definition of a successful show, we are talking about a show that people like therefore will return to. There is considerable precedent in the industry as you will find in the first two weeks of every new season,whether it be in September or January or February, that there is an extraordinary sampling and that you can have a show normally like the Phyllis Diller Show come on on ABC and be the Number 1 show on the air practically, 56 share the first time, the second show have a 35 share of the audience.

I don't thinkit is important to define what we mean by share,but it shows that it becomes considerably less popular, and thenthe third time out it be considered a probable disaster after a good start.

And the old hits opposite it suffered substantially in the first two weeks.

However, there are, I think, shows on the air like the Waltons, which have an intense loyalty factor for

other reasons and people don't look at it, even though it is not the Number 1 show on the air, it is almost a religion for those who look and they would think that they would be ostracized from the church if they didn't lo-k at it any given week.

So they didn't bother to sample. For example, one week ago, My Fair Lady was on, Thanksgiving night, against, I suspect, a rerun of the Waltons -- I can't remember if it was new or old -- and My Fair Lady did not get an extraordinary movie rating simply because the loyalty factor was so constant on that program.

Q I think it was CBS that ran Duel at Diablo Thanksgiving night in opposition to My Fair Lady.

MR. TOPKIS: Mr. Hruska's client loyalty surpasseth all understanding?

MR. HRUSKA: That shows how wrong you are. I watched My Fair Lady.

A But could I suggest to you that theWaltons ran that night.

Q Well, it is a matter of record.

THE COURT: May I, Mr.Hruska, because we have a number of witnesses here today, and so fotth, and I find this very interesting, but I would like to know what

you are trying to put before me.

MR. HRUSKA: Well, I am about to move to another subject.

THE COURT: Okay.

Q Do I assume correctly, Mr. Dann, that you are not aware of the existence of the facilities and machinery available in the market place for direct licensing in movie rights, mechanical rights and television synchronization rights?

A Correct.

Q Do you know of the Harry Fox Agency?

A I do not.

Q And you are also unaware of the fact that that agency cures problems for producers of programs and movies and phonograph records of identifying, locating and coming to terms with numerous copyright owners and doing so in relatively short periods of time?

A I do not.

Q I assume also that you do not know why these particular forms of direct licensing facilities were created?

A I do not.

Q And you do not know who created these facilities?

A I do not.

Q I would like you to assume for just a moment, Mr. Dann, that the facilities were created by music publishers and they were created because there was a need for their creation, and I would like you further to assume that these facilities would not be created for the CBS Television Network in the event that the network cancels its ASCAP and BMI licenses and the other television networks retained theirs.

On that assumption, I would like to ask you --

MR. TOPKIS: Before we leave the assumption, you can't create something for CBS Television Network that was created 25 years ago by music publishers. That is a logical --

MR. HRUSKA: Similar facilities or sufficient facilities.

THE COURT: Let me hear the question. I agree with your statement, Mr. Topkis, but let me hear what Mr. Hruska is trying to bring out, whether it is permissible.

Q Would you believe, or do you believe, Mr. Dann, that the lack of such facilities in the event of an attempted bypass by CTN would create a risk to CTN that the producers of CTN programs could not obtain all of it or a substantial part of the ASCAP and BMI music which they desired to use.

THE COURT: I will sustain the objection to your

question as to form. In the first place, it doesn't seem to me to make any difference, if you are going to assume that there wouldn't be any facilities what other facilities there are for movies and so forth and so on.

It seems to me that you are making very complicated what could be a very simple question, namely, does Mr. Dann think that if the CBS attempted to deal directly with composers or publishers, the lack of any central facilities would interfere with their ability to do the job.

Isn't that really what you are asking him?

MR. HRUSKA: Yes.

THE COURT:That is what came through to me -- can they do it without central facilities?

MR. HRUSKA: Yes. I would like to adopt that question, your Honor, and see if Mr.Dann can answer it.

A The question is, if there was no existing clearing house --

THE COURT: If CBS, let's say, canceled its ASCAP arrangement and there were no other centralized arrangements --

A Could the present clearing house concept function in view of the ASCAP --

THE COURT: No. Could CBS get the music it

wanted directly.

THE WITNESS: But ASCAP and BMI would stay in existance and work with the other networks?

THE COURT: Right.

THE WITNESS: While CBS would be forced to set up some sort of a clearing house structure in a competitive market place picture of existing contracts some place else?

THE COURT: Well, you weren't --

THE WITNESS: The ASCAP-BMI contracts would say in effect with NBC.

CBS would be forced to set up a structure --

THE COURT: That is your conclusion, that they would.

THE WITNESS: No, I am sorry.

MR. HRUSKA: That is not part of the question. That is why I did it in the hypothetical way.

THE COURT: Well, let us start again.

If CBS did cancel or for some reason it didn't do business through ASCAP and BMI, and the other networks did, in your view how would CBS go about getting music and to what extent do you think they would be able to do so.

THE WITNESS: If the present contract was terminated, the question is, how would CBS function as far as music was concerned and what would their problems be?

Would that be it?

Q Function on a transactional level, yes.

A On a direct licensing basis.

Q Yes. I want you to think in terms, for this question, of the transactional aspects of the matter.

A Trans --

Q Transactional, in the sense that --

THE COURT: What do you mean by transactional? I mean, how would they get their music?

MR. HRUSKA: The physical side of making contact with copyright proprietors.

THE WITNESS: Well, I would think -- first of all,you must remember that you have just addressed a very specific question to me when I have already testified that I know absolutely nothing about existing machinery elsewhere that somewhat reflects this particular function for CBS.

THE COURT: We understand that.

THE WITNESS: But if you would like my opinion, I then have to resort to the position that CBS, as probably the largest user ofmusic in the world and with its ability to program television shows which is to create them, put them on the air in living color and bring them into your household to the exact second on 52 weeks a year some 18

hours a day, I would think the problem of dealing directly on music would not be the most challenging that they have ever faced.

Now, I wouldn't think that any bureaucrat would volunteer for the assignment.

THE COURT: Well, to be more specific --

THE WITNESS: They would function and solve the problem.

THE COURT: Do you have any opinion as to how they would go about it? How you would recommend going about it?

THE WITNESS: No, I do not.

Q You also testified on direct examination, Mr. Dann, regarding the expense of putting television programs together, putting specials together and series, etc., and you also said that music performance rights represented a small part of that expense.

I would like you to assume that you were the chief executive of the CBS Television Network today and one of your assistants approached you and said, "Mr. Dann, I have got an idea I would like you to consider, which is that we drop our ASCAP and BMI licenses, and attempt to fill our music requirements and producers do so by direct licensing because I think we can save some money by doing that."

Would you be willing to run any significant risk to those programs costing hundreds of millions of dollars for the sake of saving some money in music performance rights?

A Yes, because networks take constant strike activity on just such a principle, that they -- the question of gambling a couple hundred thousand dollars, five million, ten million, is something we always live with all the time. It really has to do with the merit of the moment. I think network executives operate by principle and conviction

and good business constantly.

You know, networks have presidents and vice-presidents and treasurers and accountants and even lawyers and it all depends who is in sway and what their feelings are.

I know some that were presidents in my history, you know, they would say "Let's have our own ASCAP, we could have our own composers."

I mean, it wouldn't be right. On the other hand, if you came to the program head he might feel very strongly about ASCAP's function or not strongly about it.

So I am trying to say that if -- when you lump together what should be done I think you quite correctly ask me what the chief executive would say, would he jeopardize his budget projections for the year by obviously in this case having a conflict with the present music structure, if I can put it in laymen's terms, then I think he would think seriously about it and decide on the merits of whether or not he thought they could survive and whether or not in principle he was right.

This may be the case now, whether there is a question of principle, you see. I don't know.

Q You testified before, Mr. Dann, that a couple of

thousands to the producer of a program costing a couple of hundred thousand dollars was not a terribly meaningful figure.

A It was not.

Q And I find that difficult to reconcile with your testimony just now that you as the chief executive of a television network would be willing to put at risk hundreds of millions of dollars worth of programming for the sake of saving some money on music performance rights which you said was an insignificant part --

A Excuse me. It seems to me --

Q -- of that figure. Could you reconcile those two?

A Yes. First of all, I will pick you up, if I can, on the smallest part of it, which is not important, I think was referring to producers attitudes towards budgets and how to do shows versus chief executive officers and how they approach things, which is to save every dollar every place.

But when you use the phrase would somebody do something that jeopardizes hundreds of millions of dollars, I don't think people do anything that would jeopardize hundreds of millions of dollars.

Now, where I am a little bit apart, and we

haven't made it quite clear between us, is what is in jeopardy and how, on what basis. I don't understand it. The word jeopardy implies by definition danger and the word danger obviously is something no chief executive wants to live with.

On the other hand, calculated gambel has a sense of reality.

Q The question I asked you, Mr.Dann -- and perhaps it was a failure of communication between us -- the question I asked you in effect asked you to assume that this course of action, dropping the ASCAP and BMI license, would pose a significant risk to the lineup of programs, to the schedule. The question was --

A To the functioning of the schedule, to the ratings of the schedule?

Q To the ratings of the schedule, to the audience acceptance of those programs. The question was, would you run such a risk for the sake of possible savings on music performance rights?

THE COURT: Doesn't that question involve so many invariables as to be meaningless, whatever the answer is? If it were to save over a period of many years a large sum, it might be one thing. If it were a very small

sum it might be another.

Besides that, Mr. Hruska, I guess it is legally permissible but psychologically inappropriate to make Mr. Dann assume that the problems of securing music will be a threat to the structure of the network when rather positively he has testified that in his personal opinion anyway he doesn't think it would be a threat to the structure of the network.

THE WITNESS: Yes. That was my difficulty. I had difficulty operating on the hypothesis of what he referred to certainly as substantial risk or danger. You know, all my thoughts of this moment are such that that risk was non-existent.

THE COURT: Of course, he is asking you to assume what you believed in 1970.

THE WITNESS: I was going to suggest that he -- that is why I very quickly said at the moment. P t I think --

THE COURT: I don't think it would be very helpful for me to have Mr. Dann's opinion on this subject, even if he could give it.

Q You referred on your direct examination to the mechanical cost of substituting new music on a sound

track of a film or on the tape of a program.

Of course, the mechanical cost --

MR. TOPKIS: I think he was talking about a commercial.

Q The mechanical cost is only a minor part of the cost thought, isn't it?

A Absolutely.

Q Do you happen to know the areas of additional cost?

A I indicated I thought in my testimony it all depends whether somebody had -- first of all, whether it was recorded music in existence, whether it was a tambourine, it was a full marching band with crowd noises that were real.

THE COURT: How about an ocarina?

THE WITNESS: An ocarina. I am sorry. I don't know a range that would be meaningful.

Q In substituting music that has already been recorded on a television program in the can you would have to have new music written, you would have to have an orchestra assembled, you would have to hire a place for that orchestra, you would have to have the sound equipment. Is all this true?

A Yes. On variety shows it would be almost

impossible, because you would have to work with lip sync and all of that. On the two variety shows you could. I mean, it is very complicated. Well, it all depends how you do it. There is somebody in the room who is much more qualified to discuss this specific phase of implementation. I quite readily agreed yesterday that it could be sizeable and complicated.

But in film shows, the redubbing of the music track, where there isn't lip sync, you can have conceivably canned music, it is not a herculean or terribly difficult thing. In variety shows I don't think you could have CArol Burnett dub Swannee River while she is singing Old Man River.

Q Are you aware of any labor limitations on the amount of canned music that can be used on a television program dramatic series?

A Yes, I know there is a limit, but I would think then you quite correctly point out some of that would have to be then new music. You are quite right.

Q New music, and you would need then --

A I mean not canned music, performed either by the house orchestra or somebody, yes.

Q Do you happen to know the expense of rescoring

a half hour of a dramatic series, rescoring the background music?

A I do not.

I am not qualified. There is an expert here who could address himself to that.

Q You said on direct examination something to the effect that the cost of producing television programs and specials was getting so high that the economics of the business and other factors were leading toward a substantial number of reruns of programs.

A Right.

Q I would like you to assume that you were chief executive of the CBS television network and one of your assistants came to you with the idea that you should bypass ASCAP and BMI, drop your ASCAP and BMI licenses, while ABC and NBC retained theirs, but pointed out to you that you were in the middle of a season, you had a number of programs in the can and specials that you wanted to rerun and, of course, if you dropped your ASCAP and BMI licenses you would not have performance rights for those programs.

Is this a situation which you as the chief executive of a television network would voluntarily put yourself into?

A The supposition is that we are in the middle of the season?

Q Right.

A And that we have a lot of shows in the can?

Q Right.

A Or committed, in the can.

Q Right.

A And that the ASCAP relationship was going to terminate tomorrow?

Q No. The question was posed to you should we terminate that relationship tomorrow and voluntarily put ourselves in this position of having a lot of programs

in the can without performance rights.

A In the television business I would recommend we not do any radical changes for tomorrow. I mean, it doesn't make sense to change something that quickly, over 24 hours, never. I wouldn't cancel a trucking contract over 24 hours.

Q Do you know whether advertising agencies have the right to use the published music contained in their commercials on a television network which has no ASCAP or BMI license?

A I am not familiar with that subject at all.

Q Do you know whether advertising agencies have the right to use on television networks without ASCAP or BMI licenses the stock music, pre-recorded canned music?

A I am not familiar with that subject.

Q I would like you to assume that all advertising agencies in the country do not have the right to use either published music or stock music on television networks which have no ASCAP or BMI licenses. I would also like you to assume that the J. Walter Thompson agency has no right to use music originally created for their commercials on television networks without ASCAP and BMI licenses.

THE COURT: Mr. Hruska, you are cross examining Mr. Dann. I don't recall that he was examined at all with

regard to the advertising aspect of things.

He has just said, in effect, that he doesn't know anything about that aspect of it.

Why should he be cross examined on that subject?

MR. HRUSKA: Because he did, your Honor, give testimony on the subject.

THE COURT: If he did, will you remind me what it was? I don't mean the precise words.

MR. HRUSKA: He said on direct examination, as I recall it, that advertising agencies owned all the music in their commercials.

MR. TOPKIS: That was said, your Honor, in response to a question on cross.

MR. HRUSKA: No, no.

MR. TOPKIS: It doesn't make any difference.

THE COURT: I don't want to stand on that technicality either. I am very much concerned about the time.

MR. HRUSKA: We are in the top of the 9th, your Honor.

THE COURT: All right.

Q Do you remember the assumptions?

THE COURT: I think you better repeat them.

MR. HRUSKA: All right.

Q No advertising agency in the world owns the right

to perform the published music or stock music contained in their commercials on television networks unlicensed by ASCAP and BMI.

THE COURT: All right.

Q Number 1. Number 1, in the case of the J. Walter Tompson Agency, that agency does not have the right to perform music written for their commercials on television networks unlicensed by ASCAP and BMI.

Would that condition create in your mind a significant commercial risk to a television network were it to cancel its ASCAP and BMI licenses?

A Risk or commercials?

Q A significant commercial risk.

A I mean, what would they risk? I mean, you mean they would risk--the advertisers would go away? I mean, what is the risk? We are talking about risk. Risk for who and what?

Q That is what I am asking you.

A I don't think it would hurt the network. I mean, it is a commercial problem. If the advertisers have to advertise really on the network, because the network is their place, then I think the only people who would have the problem would be the advertisers and the advertising agency, I think.

Q You said yesterday that Mr. Wright and Mr. Vincent and Mr. Sunda each at some point worked for you.

A I think--yes, in some--well, when I say worked--

THE COURT: In your department, within the jurisdiction that you controlled?

A You see, when you--those young men who came along over the years, I think they all worked--when you hired a producer they were not producers, they were like unit managers, and what role they worked and how much control we had of their company change, because they were probably on--let's say we worked together in a socialistic sense for over 3,000 programs, all of them together, I mean, 2,000 programs.

Now, what role they had at any particular time--certainly they didn't report to me directly and I think during that time they worked for producers who I hired.

But it would not be a fair assumption to say that they were on my personal staff, my staff, so I had to give them Christmas presents or anything like that.

The business doesn't work quite like that on shows. Even these men that you are talking about haven't necessarily worked--Wright probably has, but the other ones haven't--he has been with Banner, I think, Wright.

Q Yes.

A He has been with him from the Gary Moore Show. But we owned, for example, the Gary Moore Show, and I brought in Bob Banner, helped him start his company, hired Bob Banner, I put together Bob Banner's company, which took over production of the Gary Moore Show. I think Bob Wright at the time was hired by Bob to help set up his production company as a business manager.

During that time I would see Mr. Wright many times, but Mr. Banner, in so many words, reported to me.

That would be typical of that.

Q Mr. Dann, what part of the record of this case did you read prior to testifying here?

A My memory is as bad as where we last saw each other in 1970.

THE COURT: Do you have anything that can refresh his recollection on that?

Q Mr. Topkis brought out some areas of testimony which you had indicated that you had read. Maybe I could pose the question in terms of did you read any other part of the record in the case.

MR. TOPKIS: I think I mentioned to Mr. Dann all of the testimony that we made available to him, but I won't swear to it.

THE COURT: Mr. Hruska is trying to learn whether

that is all that he read.

MR. HRUSKA: Precisely.

A The answer to your question is I was sent by the Paul Weiss firm to acquaint myself with what had transpired some eight or nine testimonies, seven or eight testimonies.

THE COURT: As far as you know, they were mentioned when Mr. Topkis asked you about them?

THE WITNESS: Yes, I assume so.

Q You are being paid a fee by ASCAP for your services in connection with the case?

A I'm being paid my standard fee by the Paul Weiss firm.

Q Who approached you to testify in the case?

A I received a call from Mr. Topkis and Mr. Blumfeld or--

Q Blumstein.

A Blumstein.

I think Mr. Blumstein and Mr. Topkis called and asked if they could see me. I did not know the nature of their visit. They came into my office at 1 Lincoln Plaza and discussed with me whether or not I would be willing to testify, to answer certain questions relevant to the industry.

Q How many meetings did you have with Mr. Topkis or Mr. Blumstein or anybody else in the Paul Weiss firm or in the ASCAP Legal Department?

A I never to my knowledge talked to or discussed anything with any member of ASCAP until we had lunch yesterday, at a rather questionable restaurant.

MR. TOPKIS: Wait until you see where we are going today.

A But I did meet that afternoon with them. I later met with them--

THE COURT: "Them," you mean Mr. Topkis and Mr. Blumstein?

THE WITNESS: And some associates from time to time.

THE COURT: Right.

A --at the Paul Weiss offices and then there was a second meeting at the Paul Weiss office.

I would say there were three meetings in all. The first meeting was not of substance. It was only to determine whether I would be available.

Q The other two meetings were each approacimately how long?

A Well, since I am being paid for them, I am motivated to make it at the maximum. I would say they were two

or three hour meetings. I mean, in my terms, they are very long meetings, not in your terms.

MR. TOPKIS: May I say that they seemed that way to us.

MR. BRUSKA: Your Honor, I think on that note I will close.

THE COURT: Do you have anything further, Mr. Topkis?

MR. TOPKIS: We have nothing further, your Honor.

MISS KEARSE: Nothing, your Honor.

THE COURT: Thank you very much, Mr. Dann. It was very interesting testimony.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Shall we take the morning break at this time?

MR. TOPKIS: Fine, your Honor.

(Recess.)

MR. BLUMSTEIN: Your Honor, ASCAP calls as its next witness, Mr. John Green.

J O H N G R E E N, called as a witness by ASCAP, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. GITTER:

Q Mr. Green, where did you go to college?

A Harvard.

Q And my notes show that you were graduated at the age of 19, is that correct?

A Correct.

Q When did you graduate?

A 1928.

Q What did you do when you left college?

A I went to work in a Wall Street bond house by the name of Aziel and Company.

Q How long did you work there?

A Six months.

THE COURT: Long enough to know you didn't like it, is that right?

A That's right.

Q Have you been a professional musician ever since?

A I have.

A Am I correct that your music education is the result largely of self-teaching?

A In the extended and more sophisticated forms, yes.

Q Now, you have been a musician since 1929 and your career has included the writing of songs and standards, has it not?

A It has.

Q Could you name some of the songs and standards that you have written?

A The big ones?

Q The bigger ones.

A Coquette, I Am Yours, Out of Nowhere, I Cover the Waterfront, Easy Come, Easy Go, You're Mine You, Song of Raintree County, Body and Soul.

You didn't hear me, Mr. Hruska? Shall I sing them?

MR. HRUSKA: Please. May I ask your Honor if the witness could be asked to speak up just a little more, if that's possible.

THE COURT: Why don't you move into the jury box. I do like witnesses to speak up but I also like them to feel natural.

A Would you like me to repeat the list? I enjoy doing my medley.

MR. HRUSKA: "And then I wrote;" Yes.

THE COURT: I would be surprised if Mr. Hruska didn't know what your accomplishments were.

MR. HRUSKA: Yes, I know the list, Mr. Green.

Q And Mr. Green, are you a member of the Songwriters Hall of Fame?

A I was inducted last June.

Q Mr. Green, have you been a composer in the serious field?

A I have.

Q Could you name for the Court some of the compositions and some of the work you have done in that area?

A Yes. A Fantacia for piano and orchestra, called Music for Elizabeth, that has been performed by major orchestras and soloists;

A symphonic work based on, but not including the actual material in its original form, based on the thematic material from my score for the film Raintree County entitled "Raintree County, Three Themes For Symphony Orchestra";

A work in which I functioned as a composer-adapter, speaking categorically and not qualitatively, in the sense that Rachmaninov and Brahms worked on themes of Paganini and Haydn, in that I created a rapsody for Piano and Orchestra derived from the material of Aaron Copeland's El Salon Mexico,

under the title, Fantasia Mexicana, which is published as Copeland-Green.

And several other works.

Q And you have also been a conductor for a great many years, have you not?

A I have.

Q Could you name for the Court some of the orchestras that you have conducted?

A Los Angeles Philharmonic, Philadelphia Orchestra, the Boston Pops, the Denver Symphony, the Houston Symphony, the Israel Philharmonic Orchestra in Israel. The Miami Philharmonic. And on and on, most of the major orchestras--the BBC Orchestra and Symphony in London.

Q Mr. Green, is it fair to say that your conducting has ranged from the pop music field to the much more conservative serious music?

A Not only conservative but contemporary and avante guarde, yes, both fields.

Q You have conducted operas?

A Yes.

Q And symphonies?

A Yes.

Q Concertos?

A True.

Q Have you worked as a composer of motion picture scores?

A I have.

Q Could you name some of the motion picture scores which you have worked on?

A Well, going way back when I started with Paramount, the first film that I did was a film called Secrets of a Secretary. That was the first one.

Then, coming up into later times, my most major score, most raspected score is the score for the MGM film, Raintree County.

A film called the Sailor Takes A Wife. You are talking about dramatic films, I presume.

Alvarez Kelly at Columbia Pictures and then a great, great deal of original music by me in films that were essentially musicals but in which there was a great deal of dramatic background music, and in cases where that music was not based on the thematic material of the songs, it was all mine, of course.

Q Could you give us some examples of that?

A Oh, well, we start with Fiesta, which was the film for which I initially wrote the adaptation of Copeland's El Salon Mexico, in a film called Meet Me in Las Vegas, the big ballet sequence in which the prima ballerina was Cyd Charise.

I wrote the Frankie and Johnny Ballet.

In Easter Parade, of which film the song composer was Irving Berlin, I wrote the background score for that, which did include music of my own.

The film starring Mario Lanza, called the Great Caruso, I wrote the background score for that.

Some of that was based of course on operatic material.

High Society--well, that is a sampling.

Q Have you been nominated for any Academy Awards?

A Fourteen times.

Q Have you one any Academy Awards?

A Five.

Q Have you also worked as a lecturer in musical fields?

A I do constantly.

Q Have you worked as a composer of background and theme music on television film shows?

A I have.

Q Could you give us some examples of that work?

A Well, the first one is a little tragic because it is several pilots that didn't sell. The main one was a series on NBC called Empire, which was on for a whole season, did not survive the second season and of that, I was the

composer.

Q Throughout the season?

A Yes.

Q Mr. Green, are you a member of the CLGA?

A I am.

Q Are you an officer of the CLGA?

A No. I am a board member.

Q Would you tell the Court what the CLGA is?

A The CLGA stands for Composers and Lyricists Guild of America and it is, to put it in general terms, it is the union that represents the writers of words and music for films in theatrical motion pictures and television and has up to the point of currently in progress litigation been the creator of the MBA or minor basic agreement upon which composers and lyricists in the film industry both for television and theatrical motion pictures, have worked for several years.

MR. GITTER: Your Honor, so the record may be clear, I am advised that the precise status of the CLGA at the present time is a little unclear in legal terms.

At one time, at least, it was a board certified collective bargaining agent.

THE COURT: Is the union's status of any significance?

MR. GITTER: I am not sure but Mr. Green referred to it as a union and I wanted to make sure that he may not be talking technically of a board certified organization.

THE COURT: I can't believe it would make any difference in this case. It seems to me that the history and the mechanics and dynamics of the situation are not too englightening but thank you.

Q Mr. Green, are you an officer of the Motion Picture Academy of Arts and Sciences.

A I am vice president.

Q That is the organization that distributes Oscars, is it not?

A Among many other more important functions.

Q Do you hold an office in the AGAC?

A I am a council member.

Q Mr. Green, could you describe for the Court how a background score or theme--and a theme, for a television series, is created?

A You mean the chronology of that?

Q Of the actual creation of the work.

A Well, the producer of the film engages a composer and has preliminary discussions as to the kind of music he would hope would be forthcoming and the next thing is for the film, usually in television in any case, a final cut

of the film to be run for the composer, who studies it and, having studied it then has what is called a spot run, meaning he spots the music, where will the music start, where will it stop.

Then the next thing that happens is the so-called music editor, in terms of that designation of start and stop, he prepares what is called timing sheets in which all the action is listed and calibrated in terms, usually, of thirds of seconds and/or footages.

THE COURT: You said the music editor does that? Is that a separate person from the composer?

A The music editor, your Honor, is in effect a film or track editor.

In other words, the picture editor deals with the individual use aspects and the music editor who sometimes is also general sound editor deals in terms of the physical editorial functions in connection with the audio part of the film.

And then the composer writes the music according to these timings. There are various other methods of targeting towards the ultimate achievement of synch lip synch and other types of synchronization, such device is known as click tracks and so forth, I don't think you want me to go into that detail--but there are several areas of metholo

methodology, hear and then the composer, according to whatever the schematic of timing is writes the music and orchestrates it, and/or causes it to be orchestrated.

And then the next thing is the actual recording of that music with whatever instrumental or other sound media have been decided upon by the composer by himself and in conjunction with advice from the producer and/or director.

Then, that music is recorded and then the next process is the rerecording process wherein all of the various elements of sound are passed, to use a figure of speech, through one form or another of electronic function, so they all come out on one track, which then is affixed to the video track or picture and that gives you your score in conjunction with the film.

Q Now, about how many minutes of background music does a typical film dramatic show on television have, let's take a half hour show, first?

A Half hour show, anywhere between 15 -- around 15 minutes to 20 minutes. 20 minutes is a lot in a half hour show.

Q What about an hour long show?

A An hour show, in the neighborhood of 40 minutes, 45, perhaps.

Q Have you heard the term "tracking"?

A Oh, yes.

Q Could you describe for the Court what tracking

is in connection with a television film series?

A You are talking in terms of practice?

Q Yes, in terms of practice.

A Well, the methodology with regard to the music in television shows is that if a television series, dramatic series, is going to be on let us say, well, let's talk in terms of a 13-week segment because this is convenient for this discussion.

The composer will probably write six or seven original scores for six or seven episodes and then the remaining six or seven are scored by the use of track derived from the six or seven original scores that he wrote.

Q Who does that?

A That is the work of the music editor.

Q Now, you told us that the process of creating a background score and the theme for a filmed series begins with the producer engaging a composer.

Is this ordinarily done in face-to-face negotiations between the producer and the composer?

A The engagement?

Q Yes.

A No. I would say no on that. Of course, there is always the element of personal acquaintance but I don't think that is what you are getting at, Mr. Gitter, usually,

one of the talent agencies that specializes in film composers does the selling and the negotiating and making the deal.

Q Am I right, though, that typically there is a contract between the composer and the producer entered into?

A Oh, yes.

Q For the creation of a score?

A Right.

Q And that is typically before it is written?

A Well, since I am --

THE COURT: Before the music is written?

A Since I am talking to a lawyer, and with a Judge on it, in the courtroom, I would say that there has been reached an agreement which ultimately will find its way to a contract which may not be forthcoming until months after you have completed the picture.

Q Mr. Green, I show you a document that has been designated as AX290 for identification, and ask you whether you recognize that document.

A I do.

Q Can you tell us what that document is?

A This is a document that I previously referred to as the MBA of the composers and lyricists guild agreement.

and this is dated 1957, so I am very familiar with it.

Q Is this an agreement entered into between the CLGA and producers of television filmed material in California?

A I don't think you meant to say between CLGA and the producers, did you?

Q No. I think I did mean to say CLGA.

A Oh, this is the minimum basic agreement. Of course. It is a slip of the mind. I was thinking in terms of the contract.

Yes. Well, as of that date, which shows on this MBA, there was an agreement between the CLGA and the producers association.

Q Am I right that this agreement that we marked as AX290 is not presently in force?

A That's right.

Q But am I also correct in understanding that the agreements like it or terms similar to those contained in this MBA are prevalent in the industry at the present time?

A I think that is a fair statement.

MR. GITTER: I would like to introduce AX290 in evidence.

MR. HRUSKA: No objection.

THE COURT: Received.

MR. HRUSKA: May I state for the record, your Honor, we have a ground rule on documents and that is that the day before documents are to be offered into evidence in court, at the close of trial notice is supposed to be given to the other side.

We did not get notice of this document. I happen to be familiar with it and I know I have no objections to it.

But, as a matter of routine, I urge that the ground rule be observed.

THE COURT: I urge everybody to stick by the rules and the best way is for everybody to do some self-policing and in this case, I suppose the plaintiffs would ask whether anything will be put in the next day.

MR. GITTER: I introduce the exhibit now. We will call to your attention in post-trial briefs the relevant portions of it. I don't think I need to go into it with this witness. The portions of the agreement will describe to your Honor the kind of rights that are conveyed to the producer by the composer.

THE COURT: Maybe I don't need to know.

MR. GITTER: The answer is that the copyright is conveyed to the producer, your Honor.

MR. HRUSKA: We are in for a big legal hassle on this.

THE COURT: All right. Forget it.

MR. GITTER: I was afraid so, and I thought we would leave it for post-trial briefs.

THE COURT: All right.

Q Mr. Green, can you tell us what the background composer typically receives for the scoring of say a half hour show on television?

THE COURT: You mean in terms of money or what?

MR. GITTER: Yes. In terms of money, from the producer.

A I am not hesitating on account of lack of knowledge of the figures. I am looking for the proper phrasing of my answer.

Typically, the composer is paid for three functions in one overall price. I think it is important that I make that clear in my answer, counsel.

The three functions are composition, orchestration and conducting.

And on a half hour show when you say typical, I think you mean --

Q The range.

A Yes. Between 750 and a thousand dollars.

Q And on an hour show?

A Between 1500 and 2000, in that area.

Q Do you know what a composer would receive from ASCAP, typically, in the way of performance fees for the performance of a half hour show?

A I would think --

Q A single performance.

MR. HRUSKA: Perhaps we can limit this to Mr. Green's personal experience. There have been a number of questions about what is typical and so forth, but when we get into a particular area such as this --

MR. GITTER: There may be an easier way to do it. The witness has testified that a typical half hour or hour show contains certain numbers of minutes of music. We can find out from our records just what a minute or couple of minutes of background music receives in terms of performance credits. And that we can translate.

THE COURT: You can find out from your records anything you want to about these matters. I suppose.

MR. GITTER: Yes.

THE COURT: I will note for the moment that ASCAP

performance rights are in addition to the amount that the composer is paid for the production of the score.

THE WITNESS: That is correct.

Q Indeed, Mr.Green, am I right that the background and theme composer looks to his performance royalties for the principal source of income for background and theme music?

A That is a correct and fair statement.

THE COURT: Of course, am I not correct in understanding that the performance revenues depend also on how many times the show is actually done?

THE WITNESS: Oh, yes.

THE COURT: But you mean only if it is only done would they look to --

THE WITNESS: Your Honor, I prefer to answer it this way -- that the composer, in doing this kind of work looks for the potential of income from performance rights in the event that the venture is successful and we don't go into these things looking for flops whenwe go into them.

In the event that the venture is successful, the composer looks to a far greater revenue from performance rights than he got from the initial writing. I think that is a fair answer.

THE COURT: I understand.

Q Maybe this point is not clear, but for a season's

run of a silm series, am I right that the composer will not be writing a whole, say, 39 separate scores for each episode of the film series, but he will be writing seven, perhaps ten or whatever numbers of episodes?

A Correct.

Q Of original music?

A That is the general rule, yes, I would think.

THE COURT: Does that mean that it works out, however, because of the tracking aspects of things, that you receive revenue from each performance?

THE WITNESS: You do.

THE COURT: Although you have only written music, let us say --

THE WITNESS: The performance, it is not a question of when you wrote it, but a question of when it is used.

THE COURT: I understand that.

Q Mr.Green, suppose the following hypothesis.

That CBS canceled its ASCAP blanket license and NBC and ABC continued to hold blanket licenses from ASCAP and suppose that either CBS or a producer of a CBS film series show came to you and sought to engage you to write the background and theme music for the show.

Would you be inclined or disinclined to negotiate

with him for the writing of that music?

A I would be inclined to negotiate with him.

Q Do you have an opinion as to whether other background writers and composers would be inclined or disinclined to negotiate with CBS or its producers in that situation?

MR. HRUSKA: I object, your Honor. I don't think his opinion on that subject --

THE COURT: Well, if he says he has an opinion, then before we hear the opinion, let's hear what the basis of the opinion is and I will see whether it is worth hearing.

Q Do you have an opinion?

A I know how I would like to answer that question. I don't have an opinion but I would be surprised if they didn't feel exactly as I do.

MR. HRUSKA: That is why I objected when I did, your Honor.

Q Mr.Green --

MR. HRUSKA: Moreover, for the record, I will move to strike it.

Q Mr.Green, can you tell us why you would be inclined to negotiate with CBS or the producer of the CBS show in that situation?

A For the following reasons. I like to think that part of my motivation is esthetic and artistic, but I am also a fellow who earns his living by the making of music in various forms. I am also an artist who derives only secondary pleasure from thinking how great my music is when I hear it in my head.

I like to hear it performed and I like to get paid for hearing it performed and you referred to CTN -- would I be inclined to negotiate with CTN for the performance? Well, they are one of the principal outlets in the world for the performance of music and I want my music to be performed, I want the public to hear it, I want to get paid for it and I would be totally inclined to negotiate with anybody who would like to use it.

Q Mr. Green, you have also told us that in addition to your work as a background composer you have written songs in your music career.

Suppose in the situation we posited just a moment ago, CBS canceling its ASCAP license, suppose one of your publishers called you up and told you that the producer of a CBS variety show is interested in using one of your compositions, one of your songs, on a show, and he asked you for your opinion or view, would you be inclined to recommend that he license or negotiate with CBS or the producer or would you recommend that he not negotiate with CBS or its producer?

A I would recommend that he negotiate.

Q And why?

A Because I would want my song to be exposed and I would also want to derive the revenue that would come from such a source as CTN for that exposure.

MR. GITTER: I have no furtner questions, your Honor.

MR. HRUSKA: I do.

CROSS-EXAMINATION

BY MR. HRUSKA:

Q Mr. Green, you were asked some questions about

the scoring of television programs. When you work on a television program as the composer do you from time to time write incidental music for the program to fill in here, there and perhaps everywhere on background?

A Are you talking now about dramatic shows, Mr. Hruska?

Q Dramatic or comedy. Is there a difference?

A No. I mean as against a so-called musical show, a variety show.

Q Yes, right.

A Well, that is the whole function of the composer in connection with that type of show, is to compose what is generally referred to as background music. If you prefer the term incidental, I don't, but if you do, that is fine.

THE COURT: Isn't background a term of art we have used throughout the trial too?

MR. HRUSKA: Yes. In this question though I was attempting to draw a distinction and perhaps my terminology is not familiar to Mr. Green.

Q You write the score for the program at the beginning of the season, I take it, before the program actually gets produced?

A Well, are you talking about a given episode, are you talking about the theme, Mr. Hruska? I am not being obtuse. I just want to understand.

Q I am sure we will work it out very quickly between us. Mr. Gitter asked a question about writing the score for the program at the beginning of the season and then not changing it or perhaps typically not changing it.

A I don't think he asked any such question.

Q I see. Let me go back to square one, and perhaps get it straight.

You are retained for the program, say Program X.

A Right.

Q That program needs music. You sit down and because of your genius you compose it.

A Thank you.

Q I am a great admirer of yours.

A Thank you, sir.

Q And that music that you compose is used as the score of the first episode?

A Yes. I think I can be helpful, Mr. Hruska. The first thing that happens typically on a dramatic series where the composer concerned is to come up with the theme.

Q Right.

A All right. So the theme, if the producer likes it, and the composer is in, that theme is the entity that you may be sure will be heard throughout the series.

Now, what the composer does from that moment on is that he works in terms of the given episode that has been completed and for which he is writing the background score in which that theme will no doubt have its place.

Q So that for each program that you work on you would be composing additional music?

A Correct.

Q Have you done any Broadway shows, Mr.Green?

A I wish you hadn't mentioned that. I composed three of the largest cast iron manhole covers in the history of the Broadway theatre.

Q I will drop it.

A Not on my head, please.

Q Have you ever served on any ASCAP committees?

A Yes,sir. I am now a member of the West Coast writers advisory committee and I have been a member of ASCAP since 1932. So intermittently in that time I have been on various committees within the organization on both coasts.

Q You have not been on the ASCAP board, I take it?

A No, sir.

Q When did you join AGAC? Did you mentionthat this morning?

A I was a founder member of AGAC when it was the songwriters protective association.

Q That title has always intrigued me, Songwriters Protective Organization.

A Association.

Q Who was the organization protecting the writers from?

A Okay. The publishers, fundamentally.

Q What do you perceive to be the main benefits to you of membership in AGAC?

MR. GITTER: Your Honor, is AGAC on trial here?

THE COURT: I don't think so.

MR. GITTER: I don't think so either.

MR. HRUSKA: AGAC certainly is not on trial here. We are exploring the witness' state of mind.

THE COURT: I will allow the question. I understand that AGAC is not on trial. Neither is Mr. Green.

MR. HRUSKA: Certainly not.

A Well,you are talking about a long period, Mr. Hruska. AGAC is involved in many activities, but you asked the principal benefits to me.

AGAC has devised over the course of its exper-

ience a basic contract, which you know about.

Q Yes. Did you participate in that, by the way, the ideas that went into that contract?

A I did, way, way back, and I have been consulted many times along the way, and I think the creation of that contract, your question having been posed in terms of benefits to me -- well, as a composer, as a songwriter, I feel that that contract is beneficial.

ThenAGAC does pursue the functions for which it was originally created as the Songwriters Protective Association in the first instance, which is policing the payment of royalties to its members by the publishers, carrying out audits on the publishers royalty payments, being interested in matters concerned with revisions of the copyright law in this country, application of the copyright law of this country to the copyright laws of other countries in relation to the best interests of the creators of words and music. We have such cogent problems in today's massive instant communications around the world as the question of secondary lyrics, meaning lyrics in a foreign language to an originally English lyric song.

AGAC is active in all of those matters, and therefore I think of enormous benefit to me as a creator

of music.

Q Could you briefly summarize the benefits to you of a CLGA membership?

A I can't say good morning briefly, Mr. Hruska. I will try.

Q Mr. Topkis says I have the same problem.

A Well, yes. Pre-CLGA, the position of the composer in the composing market in films, as we composers saw it, was as ridden with inequities and difficulties of working conditions and miniscule payment for major work as faced the writers prior to the formation of the Writers Guilt. I think that is a valid comparison. That is why CLGA came into being.

We composers felt that we needed at that time -- and now I am using the term advisedly -- a certified collective bargaining agency, a NLRB certified collective bargaining agency, and that is what CLGA came into being as. What other counsel referred to as the present nebulous state of that facet you probably know all about, because you know what is going on now in that case.

But nevertheless, that came into being because of the feeling that we composers and lyricists had of the acute need for us to be represented by an authorized, legally

sound, effective collective bargaining agency, and to the degree that CLGA has been able to achieve those objectives obviously as a composer I feel that I have been greatly benefited.

Q Has it improved your bargaining position in terms of dollars and cents and other terms of contract?

A I think so.

Q Are you on the four fund plan in ASCAP distributions?

A I am.

Q Do you believe that plan to be of substantial benefit to you in relation, in comparison, to receiving distributions on a current performance basis?

A Yes, I think the four fund plan is better for me. That is why I am on it.

Q Could you briefly state the principal benefit you derive from it? Is it income averaging?

A Yes.

MR. GITTER: Your Honor, this is entirely without the scope of the direct.

THE COURT: I agree. I will allow it, Mr. Hruska, if you want to make Mr. Green your witness on this subject. But it doesn't seem to me to have anything to do

with what he was questioned about.

MR. HRUSKA: I can understand how it might not appear that way on the surface. In reality it does bear on the testimony which Mr.Green gave at the very end of his examination.

It bears quite strongly on it.

THE COURT: I don't see it. I am saying at the moment that if you go ahead he is your witness. That is the risk.

MR. HRUSKA: Fine. I will take that risk, your Honor.

THE WITNESS: Am I your witness?

THE COURT: He is stuck with your answers.

Q I don't really think it is going to matter much on this answer, Mr. Green.

What is the principal benefit to you under the four fund plan? I am not asking you to describe the entire plan in all of its complexities. I just want to know whether you can net out a principal benefit.

A Well,I will give you my -- don't forget that I am fundamentally an artist, Mr. Hruska.

Q I could never forget that, Mr.Green.

A I am not an accountant. It is my opinion that I can answer your question in one word. You asked what principal benefit to me. Money. I think it is better for me.

Q More money or the way you get it in terms of riding out peaks and valleys, averaging?

A I think the only correct answer for me to make to you is that in terms of the structure of my catalog and life's work in relation to ASCAP more money. I get more money I think by being on the four fund plan, which is why I like it better for me.

THE COURT: Do you mean you think you get more each year or you get more on a period of time or both?

The reason I ask the question is that I have

understood from other witnesses in describing the four fund setup that one of its purposes is averaging, preventing peaks and valleys, and not necessarily to produce more money, but to see to it that things are evened out.

THE WITNESS: I think that is a fair answer.

MR. HRUSKA: It does produce more money too, your Honor.

THE WITNESS: Yes.

MR. TOPKIS: Is Mr. Hruska now testifying, your Honor? Mr. Hruska, I believe, says it does produce more money.

THE COURT: I heard him say it.

MR. HRUSKA: That would be the same --

THE COURT: But I know that the testimony comes from the witnesses. I tell the jurors that all the time.

MR. HRUSKA: If this were a jury case, I would never have made that statement.

Q Do you have any interest in any music publishing companies, financial interest?

A Only my own.

Q What is the name of that company?

A It is a company called Bedford Music, Inc.

Q And it holds the copyrights to a substantial number of your works?

A It is pathetic. It holds the copyrights to virtually nothing.

Q Mr.Green, if ASCAP were enjoined -- you know what the word "enjoined" means?

A I do indeed.

Q If ASCAP were enjoined from licensing television networks would that be good or bad from your standpoint?

A I would like the Court's and your permission, Mr. Hruska, to ask you what you mean by good or bad.

Q Sure.

THE COURT: You have my permission.

Q Do you think it would be in your best interests if ASCAP were forced out of the business of licensing television networks or would that be against your interests?

A I would like to answer you this way, Mr. Hruska: The main objective of my wanting my music to be licensed to television networks, the main reason -- and I am being totally honest with you -- is not the esthetic exposure, but the money. In other words, what I get for that performance.

So it is -- I consider my relationship to television exposure good if I am performed enough to make a lot of money from it, bad if I am not performed enough to make

a lot of money from it. That is good or bad for me.

If ASCAP were enjoined, just speaking pragmatically, I think there would ensue at least temporary inconvenience to me. But to the degree that I would be able -- my publishers and I would be able to negotiate directly with television networks, and certainly we would be willing to do so, and to the degree that, God willing, the television networks wanted to negotiate with me because they were interested inmy music, then to that degree it would be good for me and inconvenient until some method were found to replace the simplicity of operation in my life that ASCAP affords.

In other words, I am an artist. My business is writing music and conducting it, arranging it, performing it, and under the system that you envision when you say ASCAP enjoined, that means that I would have to become very much involved at least temporarily in what ASCAP does for me now. That would be inconvenient. But if the networks wanted my music and in large enough quantity to make me think that was good, that would be good for me, and if they didn't want my music, that would be bad for me.

Q Mr.Green, do you like the present ASCAP --

THE COURT: You don't have any reason to believe, do you, that they would want your music less because ASCAP

wasn't there?

THE WITNESS: Your Honor, from day to day I never have any conviction about how I am going to be wanted on a stage or on manuscript paper.

THE COURT: I can understand that. But among the variable factors which causes your music to be desired or not desired is not the question of the existence of ASCAP, is it?

THE WITNESS: No. but the way -- no, I don't think so, no. But the way the question was phrased there was a condition in there, would you think it good or bad?

THE COURT: I thought you were right to mention what you did. I just wanted to be clear what you signified by saying that.

THE WITNESS: Right.

Q Mr. Green, do you like the present ASCAP system of licensing?

A Yes, I do, Mr. Baruska. As I told you, I have been a member of ASCAP for 32 years -- I mean since 1932 -- forgive me, I misspoke myself -- since 1932, and it is very convenient.

THE COURT: Like convenient as a master charge card or something, I suppose.

THE WITNESS: Yes, except that I get money from

ASCAP and my master charge card costs me money.

Q Is convenience the only reason you like the present ASCAP system?

A I am under oath here. I can't say -- no. I think it is a good system , Mr. Hruska.

Q Good financially?

A Good what?

Q Financially.

A I think it is a good system for more reasons than that, Mr. Hruska.

Q But you would include financially within the reasons?

A Yes. I think it is effective, I think it is efficient, I think it is doing a fine job for both the creators and the users of music. That is my honest opinion. And that is one of the reasons that I think it is good.

Q Have you ever received an advance or a guarantee from ASCAP?

A I have received an advance whenfinancially embarrassed.

Q I don't mean to pry.

A No. You asked me a question. I am under oath here.

Q I know that.

A I never received a guarantee. I have on a couple of occasions asked for my -- something against my upcoming distribution when things have been tight with me. I have to answer your question. And I have always gotten it.

Q I won't ask you the amount,but could you tell me when, the occasions, the dates on which you received such advances?

A I couldn't answer that, except to say that the last time that I made such a request of ASCAP was several years ago, Mr. Hruska, I would think something in the neighborhood of eight to ten years ago, and maybe twice in my professionnal life I have been in the position where I needed some money now, and I got an advance from ASCAP.

Q Have you ever been approached by BMI with respect to the possibility of your becoming a member of BMI?

A No, sir.

MR. HRUSKA: Could I check for just a couple of moment, your Honor?

THE COURT: Certainly.

(Pause.)

THE COURT: Mr. Topkis, is Mr. Copland your next witness?

MR. TOPKIS: Yes, your Honor.

THE COURT: He will be here at two o'clock?

MR. TOPKIS: That is my expectation. He was due to come in by train arriving at Grand Central at 11:30, coming down here directly.

THE COURT: If he gets here earlier I would be prepared to have him. It looks like Mr. Green's testimony is taking less time than we expected because he expresses himself so well.

THE WITNESS: Thank you, sir.

MR. HRUSKA: No further cross-examination, your Honor.

MR. GITTER: No redirect, your Honor.

THE COURT: All right. Shall we just convene again at two o'clock? You don't expect Mr. Copland to arrive momentarily, I take it?

MR. TOPKIS: I wouldn't want to so suggest.

Would your Honor want to resume our documentary review?

THE WITNESS: Am I dismissed?

THE COURT: Mr.Green is excused.

I will tell you what I would like to do first. How can I put this? Mr. Green knows a cousin of mine in California whom I haven't seen for years and I would like to spend two minutes talking to him privately about my

cousin.

(Recess.)

THE COUET: Gentlemen, I understand that some of you aren't ready to go ahead now anyway with the documents.

So we will adjourn until two o'clock for lunch.

(Luncheon recess.)

AFTERNOON SESSION

2 p.m.

(Trial resumed.)

A A R O N C O P L A N D, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. TOPKIS:

Q Mr. Copland, surely one of the most extraordinary acts of carrying coals to Newcastle is to introduce you to any American institution, even if it be so fusty a one as our legal system.

THE COURT: Speak for yourself, Mr. Topkis.

MR. TOPKIS: I said nothing about our Judge.

There is, however, your Honor, the possibility that at some point this case will wend its way to less cultured levels.

Q For those purposes, let me ask you a few questions, sir, if I may.

A Am I to stand?

THE COURT: No, not unless you prefer to stand.

Q As I understand it, you are the holder of how many Pulitzer Prices?

A One.

Q What did you win it for?

A I won it for a ballet score called Appalachian Spring.

Q Have you written other ballet scores?

A Yes, I have.

Q Could you name a few of your favorites for us?

A Well, probably the best known or one is Rodeo and the other is Billy The Kid.

Q Have you done any composing for musical instruments?

A Yes, I have.

Q Would you name a few examples?

A Well, I've written numbers of works for symphony orchestras, including three symphonies and various concertos for different instruments and I've written, well, works in free forms. I've never actually counted them. I can't remember the exact number that I have written but there are a considerable number.

Q And have you during your time, ever conducted?

A Yes, I do conduct.

Q Regularly?

A Not in the sense that I have a permanent post as conductor. I do guest conducting around this country and abroad.

Q And have you on occasion written for the motion picture business?

A I have.

Q According to a list I have here, among the pictures which you have scored are Our Town; Of Mice and Men; The Red Poney; North Star; The City; and The Heiress.

Is that correct?

A That's correct.

Q I understand you won an Academy Award for The Heiress?

A I did, sir, yes.

Q Have you on occasion written for television?

A Only very occasionally.

Q Any experience that you remember in particular?

A Nothing significant, no.

Q There was testimony here yesterday that you had once written a melody to be played as background music while the video part of a television film was either a Jack Ametti or a Brancusi piece of sculpture.

Do you remember writing any such piece of music?

A No, I don't think that is correct.

Q That's why we call two witnesses, sometimes, to get two different stories.

A I see.

Q Do you know Mr. Michael Dann?

A The name sounds vaguely familiar but I don't think I do know him.

Q Do you perform as well as conduct?

A Well, I can perform my own works at the piano, which I occasionally do but I've never given concerts as a pianist.

Q Have you ever recorded any of your own works or the works of anyone else?

A Yes. I've recorded both as a pianist and conductor of my own works, mainly.

Q Have your recordings been with any particular record company?

A Yes. They are mostly with the Columbia Recording Company.

Q And are you still in contractual relations with Columbia?

A Yes, I am.

Q Do they record your works also as performed by other artists and conducted with other conductors?

A Yes, they do.

Q Do you have a regular publisher, Mr. Copland?

A Yes.

I have contractual relations with Boosey and Hawkes.

Q Would you spell that for our reporter, please.

A B-o-o-s-e-y and H-a-w-k-e-s, a British firm.

Q Do you hold any position in the American Academy of Arts and Letters?

A Yes, I am the president of the American Academy of Arts and Letters.

Q I understand that you have on occasion lectured at Harvard.

A Yes, I have. I was the Naughton Professor of Poetry, so called, though I talked only about music, in 1952.

And I had to, as part of my job, live in Cambridge and be in the university circle for that entire season, '52-'53.

Q Have you on occasion lectured elsewhere?

A Yes, I've earned my living at times through giving lectures in various universities and schools.

Q I understand that you at one time were a Guggenheim Fellow?

A Yes, I am proud to say I was the first Guggenheim Fellow in the field of music. That was 1925.

Q And I understand that you founded the American Festival of Contemporary Music, is that correct?

A That's correct, yes.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

Q You are a member of the National Institute of Arts and Letters?

A Yes.

Q And I understand that you are an author as well?

A You mean an author of prose works?

Q Exactly, sir?

A Yes.

Q One of them, I noticed, What To Listen For In Music, in this courtroom just a few minutes ago.

Are there any other book length works of yours?

A Yes, I've published three other books. One is called--would you like the titles?

Q If you would.

A One is called the New Music. Another is called Copland on Music. And the fourth one is made up of the lectures I gave as Naughton Professor at Harvard. That's called Music and Imagination.

Q I understand that you were awarded the Edward McDowell Medal.

A I was.

Q Could you tell us what that medal rewards, sir?

A That is a purely honorary medal that the McDowell awards to some distinguished person in the arts annually.

Q Were you awarded also the Medal of Freedom of the United States?

A I was.

Q How did that come about?

A Well, it came about through a letter informing me that I was to be awarded such medal by President Johnson.

Q When did that happen?

A I am sorry to say I can't remember the exact date but it was during his term of office and it took place in Washington, D. C., at a ceremony, at which others were also awarded in other fields, of course, the same medal.

THE COURT: We both received our commissions from the same president, Mr. Copeland.

Q You joined ASCAP around 1943, Mr. Copland?

A I believe I did. I can't remember the exact date.

Q Well, I am glad that you didn't say yes because my source tells me 1946 and it was my memory that was in error.

A 1946.

Q Prior to joining ASCAP, Mr. Copland, did you clear your works through any performing rights licensing organization?

A Well, I can't say that I actually did in practice

clear my works but a group of composers through my own efforts and the efforts of others tried to establish a collection agency for performances, rights to the performances of our works and other commercial interests that our music might have and I am sorry to say we never got anywhere.

Q You mean you never were able to get any licenses?

A No. We never got that far.

Q So that prior to joining ASCAP you were receiving no revenue for the public performance of your published works?

A Well, none except those that I might have received through my publisher.

Q Boosey and Hawkes was your publisher at that time?

A Yes.

Q Did Boosey and Hawkes belong to ASCAP, to your knowledge?

A I believe they did.

Q Now, it has been suggested in this lawsuit that in the event that the Columbia Broadcasting System Television Network for some reason or another no longer held a license from ASCAP and BMI it might come to you, as an individual copyright proprietor, as an individual composer, and seek a license from you for the right to perform your copyrighted work or works.

I would like to ask you, sir, whether if someone from Columbia came to see you you would be inclined or disinclined to deal with them or what would your reaction be?

A Well, I think I would be rather regretful about the need to individually concern myself with the licensing of a particular work, since the present arrangement takes care of a great many of those chores, as I would think of them, and it seems a comfortable arrangement as it now exists, from our standpoint at any rate.

Q If, however, the question were squarely put to you, will you deal with CBS or will you refuse to deal with CBS, what would your answer be?

A Well, I think my answer would be that of most composers. If they want to get a performance, they will do what is necessary to get the performance and if they have to deal with CBS, they would, I suppose, agree to deal with them.

Q Generally speaking, do you know through the years have you found CBS an organization with which you were able to deal?

A Yes. I've had friendly relations with them.

Q Now, you have been a member of ASCAP for some 27 years now?

I understand that you were recently elected to

the Board of Directors of ASCAP?

A That's true, yes.

Q In fact, am I correct in believing that upon the conclusion of your testimony here, you will go off to attend your first meeting of the Board of Directors of ASCAP?

A That is so, yes.

Q I mention that to implore my distinguished friend to observe some brevity in his cross examination of you.

MR. HRUSKA: I don't know who he is talking about, your Honor.

MR. TOPKIS: Well, let's find out.

No further questions.

MR. HRUSKA: May I consult for a moment, your Honor.

THE COURT: You have no questions, Miss Kearse?

MISS KEARSE: No questions, your Honor.

MR. HRUSKA: We have no cross examination.

THE COURT: All right. You are free to go to your meeting, Mr. Copland.

(Witness excused.)

MR. TOPKIS: Now, your Honor, ASCAP would like to call Mr. Arnold Broido.

A R N O L D B R O I D O, called as a witness by ASCAP, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TOPKIS:

Q Mr. Broido, you are a member of the board of ASCAP?

A Yes, I am.

Q And I understand you also are an employee of Theodore Presser Company?

A Yes. I am the president.

Q What is Theodore Presser, sir?

A Theodore Presser is a serious and educational music publisher, based in Bryn Mawr, Pennsylvania, with offices in New York.

Q Is it a publicly held company or a privately owned one?

A No. It is owned by the Theodore Presser Foundation.

Q What is that?

A Theodore Presser Foundation is an entity formed by Theodore Presser in about 1916 as an attempt to pay back

the people who made the company possible.

Mr. Presser was the publisher of Etude, which started in 1883 and Etude became the main educational publication for music teachers in the country.

The foundation was the repository of the company, and his entire personal fortune, in fact, and it has been distributing money to undergraduate music education ever since its founding. It has built buildings, owns the company. It also has a home for old music teachers, the only one outisde the Verde Home of Rest in Milan.

Q Mr. Broido, according to one of my notes, Presser is the oldest publisher inthe country, is that correct?

A Yes, in a way it is. It purchased the Oliver-Ditson Company and the John Church Company in the thirties and the Ditson Company goes back to 1783 when Battelle's Music store was the first actual publisher of music in the country.

Q AndBen Franklin was publishing the Saturday Evening Post?

A Right, indeed.

Q Could you name for us, please, some of your representative composers?

A Yes. In this country, people like Vincent

Persichetti, William Schuman, Don Erb, Hugo Weisgall.

We represent, through association, affiliation with European publishers, people like Alban Bern, Webern, Luciano Berio, Karlheinz Stokhausen, Debussy, Ravelle and so on.

Q Trace for me, if you will, quickly, please, your mature years fromyour last schooling to your position with Presser.

A Well, I was a music teacher. I graduated from Ithaca College and after the war, there were no teaching positions when I got out and I started with Boosey & Hawkes, where I was associated with Mr. Copland as his publisher.

THE COURT: Was that in London or here?

THE WITNESS: Here. In fact, I started with Boosey & Hawkes the day that it separated from the company that was its agent, Boosey, Hawkes, Belwin, and I was with Boosey for about tenyears. I had my own engraving company. I was with the Edward Marks Music Company; I was with Mercury and Century and then with the Frank Music, Frank Loesser's company, and finally with Presser.

Q How long have you been with Presser, sir?

A Four and a half years.

Q Presser belongs to ASCAP, of course. Does it

have a BMI house as well?

A Yes. A wholly-owned affiliate, Marion Music, and we also have SESAC House, which is Mercury Music.

Q I understand that you are the president of an organization called The Music Publishers Association, Mr. Broido?

A Yes. The Music Publishers Association of the United States.

Q What does that organization do?

A It is a group of -- well, it is most of the majors, serious and educational publishers are affiliated with the PMA.

Q What do you endeavor to do?

A Well, look after the interests of the serious and educational publishers. We are involved in all of the things that are of interest to the publishers around the world, everything from technology to technology of printing, the problems of copyright infringement and the theft through xerographies.

The educational contacts -- it is a complete organization of interest.

Q I understand that you are a member of the board of Music Educators National Conference?

A No. I was.

Q You were?

A That was a two-year stint, '67-'68.

Q What does that organization do?

A The MENC is the -- at that time it was the music arm of the National Education Association. It has a membership of about 60,000 music editors and music students in the country. Mostly high school, elementary school and college people.

I was on the board representing the music industry council of which I was president for that period.

Q Let me put to you a hypothetical question, if I may. I think you were sitting in the back of the room and ask somewhat the same question of Mr. Copland.

Let us suppose there came a time when CBS no longer held licenses fromASCAP and BMI and came to you to negotiate or see-ing to negotiate direct licenses with you for public performance of compositions in your repertory.

What would be your reaction?

A We would deal with them, of course.

Q Would you tell us why?

A Well, there is really very little also that we could do. We would have no choice in the matter. We would regret it because, obviously, it would be an inconvenience to us and we would regret the breaking of the

relationship but we would deal with them.

Q In recent years, Mr. Broido, has there been any particular trend in the serious music publishing field? Has it been on a rising wave, a declining one or can you offer us any guidance in that area?

A Yes. Music publishing, serious music publishing educational music publishing is a very fragile entity today. We have done, as part of the Music Publishers Association, we have been keeping tabs on this and we have found that in the last decade we can count 53 publishers who no longer exist as independent entities. This is largely due to changing technology. The Xerography and the use of Xerography illegally in schools, churches, universities, has been a terrible, terrible blow to publishing and to authors, composers, all creative people.

THE COURT: Some of the companies that I guess you say are no longer in existence have been absorbed by others, is that right?

THE WITNESS: Yes, sir. The catalogs don't disappear.

THE COURT: And the lowering of the number of companies in the industry doesn't necessarily indicate a proportionate decrease in the industry volume, I take it.

A Well, probably not.

THE COURT: I don't mean down to the penny and so forth.

THE WITNESS: No. Except that if you look at the amount of Xerography that is going on --

THE COURT: That could be true even if the companies stayed in existence?

THE WITNESS: Yes.

THE COURT: Are you suggesting that one of the reasons that they have had to go out of business is because of threats like this?

THE WITNESS: Oh, yes, indeed.

THE COURT: What, as a matter of curiosity, and I don't think it has much to do with this case, what do you do trying to fight that?

THE WITNESS: Well, education. We are constantly -- the Music Editors National Conference, for example, after many, many years, has finally, on their own, said that they will not allow any illegally reproduced music on any programs that they sponsored and that any organization using such music will be escorted off the stage.

But it took 20 years to get them to take that stand.

THE COURT: And even then I guess somebody has to go around looking at the music to find out.

THE WITNESS: Exactly.

Tk 2A

BY MR. TOPKIS:

Q Do you or does Presser, rather, Mr. Broido, belong to the National Music Publishers Association?

A Yes, we do.

Q Would you tell us, please, how your company derives its revenue, what are its principal sources of revenue,and if you could just list them in order that might be a guide to us.

A Our basic income comes from the sale of printed product. We also, of course, get money in the usual ways from performing rights, through the various performing rights societies, mechanical income and from foreign income. Those are the basic sources.

Q Have you listed them in order, sir?

A Yes, probably.

Q That is, printers are first --

A Yes.

Q -- performing rights second, mechanicals third, and foreign income fourth?

A Foreign fourth.

THE COURT: Mechanical is basically recording.

THE WITNESS: Recording, yes.

Q Let me understand something. If a Verdi opera is recorded, do you get two cents for the mechanical?

A No. It is done on a time basis.

Q I am glad to hear that.

A No, no.

Q What do you get?

A Well, it is normally a negotiated fee, but it comes out -- what, a quarter cent a minute on a long work, something like that.

Q I suppose you get license fees also or income also from the performance of works, of opera, for example --

A Oh, yes.

Q -- which are not covered by ASCAP or BMI licensing procedures?

A Right. Musical dramatic, of course, we negotiate separately.

Q I suppose you license outfits like the Metropolitan Opera here?

A Indeed we do -- happily.

Q Just to give us an idea of the scale, suppose the Met does Wozzeck. What is the license fee that you charge for something like that? If that is a confidential matter, I will withdraw the question.

A Please. It is a work that we represent and I would rather not have the figure --

Q Okay, fine.

MR. TOPKIS: I think I have no further questions. Thank you, Mr. Broido.

MR. HRUSKA: I have a few.

CROSS-EXAMINATION

BY MR. HRUSKA:

Q Have there been any discussions about this lawsuit, Mr. Broido, at the meetings, comittee meetings or otherwise, of the Music Publishers Association?

A No. I don't think so. I don't recollect any. Certainly not as part of our formal order of business. There may have been some discussion, but not that I recollect.

Q Not that you recollect?

A No.

Q Have you ever had any discussions with other music publishers about this case?

A Yes.

Q With whom?

A Well, the people at ASCAP, of course.

Q Other than in connection with your preparation for testifying here today?

A No.

Q What music publishers at ASCAP did you discuss the case with?

A Very slightly with Stuart Pope, Boosey & Hawkes. No pointed conversation that I could give you.

Q Any views expressed regarding the relief sought by CBS in this action?

A None other than the ones that I have given before, as I stated before, that the publishers would by and large talk with CBS or anyone else who came to them.

Q Did you have explained to you, sir, during the course of your preparation for testifying the per use system which CBS seeks to inaugurate by virtue of this case?

A No. No, but I think I understand it.

Q I won't take you through it.

A Thank you.

Q Am I correct in assuming that you prefer the present system to the per use arrangement as you understand it?

A Indeed. Of course.

Q Have you ever looked into, Mr. Broido, the extent to which payments by television networks to ASCAP -- to short cut a lot -- subsidize ASCAP payments to publishers and composers of serious music?

A No. You mean the relationship between the network payment and the payout?

Q Yes.

A No.

Q Are you aware of the fact that irrespective of the number of uses of serious music on network television the fact that network television makes payments to ASCAP increases payments to publishers and writers of serious compositions in respect of the use which are made of serious compositions by other ASCAP licensees?

MR. TOPKIS: If the witness understands that question, I will not object to his answering. I confess I don't.

A It is an interesting question, but I am not really sure I know what you are getting at. Are you saying that any payment made to ASCAP affects the payout? I think that is what the end of the question is.

Q My point is that payments for serious music by ASCAP are made at higher rates per some index of use --

A Yes.

Q -- for serious music than they are in respect of pop music, non-serious music.

A Yes.

Q My question is are you aware in general terms of the extent to which payments by television networks to ASCAP makes that sort of system possible?

A No.

Q You don't know?

A No. I have never done the analysis on it. I don't know that I have seen a breakdown of the figure.

Q In response to Mr. Topkis' hypothetical question regarding CBS's cancellation of an ASCAP license, you said that you would regret that situation because of inconvenience and the breaking off of the relatinnship.

A Yes.

Q Perhaps you meant to encompass within your phrase breaking off the relationship some factors which you did not particularize. If that is the case, I would like you to particularize them.

A No. I guess the breaking of relationship between CBS and ASCAP.

Q Are there any factors other than those two, inconvenience and the breaking off of the relationship, which might give you cause for regret?

A Well, I think that the current system is probably the best one that has been devised, that is used around the world in one form or another, and those countries which do not have it are working desperately to get it, and it would seem like a regressive move.

Q And you would hope that if CBS made this move, canceled its license from ASCAP, that CBS would return to the

ASCAP system?

A Well, it is a fair statement, yes.

MR. HRUSKA: I have no further questions.

MR. TOPKIS: No redirect, your Honor.

THE COURT: Thank you, Mr. Broido.

(Witness excused.)

MR. TOPKIS: Your Honor, Mr. Broido is the last witness we have prepared for this afternoon. I am sorry.

THE COURT: Can we get our documentation out of the way now?

MR. TOPKIS: I would hope so.

THE COURT: All right. I will give you about five minutes.

(Recess.)

MR. COLLINS: Plaintiff offers in evidence at this time PX053, which is the AGAC uniform popular songwriters contract, and PX062, which is a synchronization schedule which forms such a part of the AGAC contract, that is, PX062, which is the AGAC synchronization schedule.

THE COURT: What are the objections?

MR. COLLINS: ASCAP objects to these documents. BMI objects to the PX062 on the ground that it is not admissible against BMI and that it is also irrelevant. BMI has no objection to PX053.

THE COURT: What is ASCAP's objection to 053? Is that the standardAGAC contract?

MR. COLLINS: This is the standard AGAC contract.

MR. TOPKIS: My objection, your Honor, is that really don't happen to know whether it is the current one or an old one and it seems to me --

MR. COLLINS: Both of these documents were authenticated during deposition.

MR. HRUSKA: And the point about their currency comes up in the deposition too.

MR. TOPKIS: Has the deposition been received?

MR. HRUSKA: Yes.

MR. TOPKIS: Then I have no objection.

THE COURT: All right. With regard to BMI's objection, it is treated as its other objections have been with regard to the question of whether the exhibit is binding on BMI.

Therefore, the exhibits are received under those conditions, the two exhibits are.

(PX53 and 62 were received in evidence.)

XXXX

MR. COLLINS: I offer in evidence PX -- and I think I will offer these as a group and then we can

discuss them individually if there is a need to -- PX661, PX662, PX481, PX161, 163 and 164.

These documents, your Honor, tell the story of a reaction by AGAC in the mid-1950's to an attempt by the publishers to license television synchronization rights without first obtaining the consent in each case of the writer.

THE COURT: They all relate to that question.

MR.COLLINS: Yes, and they show the publishers' reaction to AGAC's position that these were in violation of the AGAC contract, the publishers taking the position that they could not do business otherwise.

THE COURT: I recall the documents. It seems to me that Mr. Lane discussed these in his testimony. Isn't that right?

MR. COLLINS: I believe he did.

MR.TOPKIS: That is the problem, your Honor. Let's take the first one.

661 is the first one?

MR. COLLINS: Yes, it is.

MR. TOPKIS: That is an excerpt of minutes of a special meeting of the Council of the Songwriters Protective Association which to the best of my knowledge Mr. Lane

was not asked about. If he had been asked about it at the time --

MR. COLLINS: I am sorry. I did not mean to represent to you that Mr. Lane was asked about each of these documents. He was not.

THE COURT: I didn't think you represented it, although I assumed that it was the case. I do agree that there has to be some foundation for putting them in.

With regard to the documents that he identified -- let's separate them. You are talking about his not having been present?

MR. TOPKIS: No. According to the note, he was present. But I don't know what was said at the meeting and he was not examined about this meeting.

May I show it to your Honor?

THE COURT: Yes. Will somebody remind me whether AGAC is a party to the case.

MR. COLLINS: AGAC is not a party. I would imagine that every member of AGAC is a party to the lawsuit, because they are writers who are either members of ASCAP or BMI.

THE COURT: Miss Stern is not a defendant, is she?

MR. COLLINS: Miss Stern is not a defendant,

but these are excerpts of minutes of meetings of the AGAC counsel, which were produced to us by AGAC in connection with the Burton Lane deposition upon our subpoena.

MR. TOPKIS: That is classic hearsay. I can't imagine anything more objectionable.

THE COURT: I don't see who they would be binding on.

MR. COLLINS: There are some documents here which are authenticated and which are signed by --

THE COURT: It is not a question of authenticity we are talking about.

MISS KEARSE: It is in some cases, your Honor. Some of these have not been authenticated even at depositions.

THE COURT: That is something else then.

MR. TOPKIS: That one wasn't either.

THE COURT: But I don't understand that to be your basic objection.

MR. TOPKIS: No.

THE COURT: I presume we can always get things authenticated.

MR. COLLINS: Your Honor, the documents which are in here signed by a party I would offer for the truth of the matter stated in them. The other documents I would offer to show the state of the mind of the people--

THE COURT: I won't take this document, for example, as indicating anybody's state of mind. If you want to call the witness and examine the witness, if it isn't too late to do so, I will hear whatever testimony there is.

This may be a good document on which to cross examine somebody or examine somebody, but I don't think it is competent in itself.

Documents that are signed by parties I will be glad to look at.

MR. COLLINS: The next letter, PX 662, which I will show to your Honor, is a letter signed by Mr. Lewis Dreyer in behalf of Shenandoah Music.

I would offer that document as indicative of the state of mind of the writer and that he made the statements contained therein, had that position with respect to this matter.

THE COURT: Is he a party to the case?

MR. COLLINS: Shenandoah Music is as a member of the class.

MR. TOPKIS: I never heard of Shenandoah Music.

Possibly some of my colleagues have. I have never heard of Mr. Dreyer. I can't imagine how this can come in.

MISS KEARSE: It is not even on a letterhead.

MR. TOPKIS: It is marked a copy.

MR. COLLINS: Again, your Honor, this was produced to us from the files of AGAC.

MR. TOPKIS: I don't care.

THE COURT: Somebody could have forged this.

MR. HRUSKA: Shenendoah Music is a member of ASCAP. The company is a member of the class of defendants.

This document represents the state of mind of one publisher and there is a group here and the state of mind of other publishers on the same subject is reflected in the group on a very important matter, the matter being the difficulties of music publishers in licensing television sync rights if they had to attain writer consent to each licensing transaction.

THE COURT: Nobody is, at least for the moment, disputing perhaps the significance of the subject. The question is the competence of the proposed exhibit.

It is, as I understand it, a document that was produced for you by AGAC from its files and there is no witness who has testified either on deposition or at the trial that it actually was written by the person who pur-

ported to write it on behalf of the organization whom you say it binds and I don't think that I should accept it that way.

If you want to call a witness--

MR. COLLINS: Your Honor, as a matter of authentication, I do think that under the liberal modern rules of evidence your Honor can consider all circumstances which would support the genuiness of the document and I think in this case the fact that it was produced from the files of AGAC upon our subpoena in connection with the deposition does support the genuiness of the document.

THE COURT: Perhaps you are right, that I would have discretion to admit it on the presumption that anything found in the AGAC files wasn't concocted, but I am bothered beyond that too about having the expression of this plunked in my lap and taking it as Gospel without the opportunity of either of the other parties to cross examine the writer--

I suppose they could call him as their own witness, but I don't know whether they want to be obligated to do that--and without the Court having any illumination of the background and significance of it.

Frankly, it seems to me you have given me a very good picture of the general attitude of the publishers on this subject.

I don't think it--I am trying not to read it until I decide whether I am going to allow it in evidence or not--can add very much, and if it can't add very much, that makes me feel all the more reluctant.

Let me reserve decision on that, but I am very skeptical on it.

MR. TOPKIS: Your Honor, Mr. Dreyer, I have no idea who he is.

THE COURT: I don't think that you must know who a person is for me to admit something into evidence.

MR. TOPKIS: No, but I think you ought to have some idea of who he is, and this record doesn't identify him.

I would suspect that Mr. Dreyer is a lawyer. This letter is marked "Re" Shenandoah." Possibly he represented Shenandoah. I don't know and I don't think you or I should have to guess.

THE COURT: I think that is an additional reason.

MISS KEARSE: I just wanted to make the point, your Honor, that members of the class are not generally considered to be parties.

THE COURT: That is a matter that concerns me too.

MR. COLLINS: Your Honor, I believe we do have a ground rule in this case that admissions by members of the

class will be considered by you.

THE COURT: Is that a ground rule that I established or by stipulation?

MR. HRUSKA: It is not a stipulation.

THE COURT: If I did, I think maybe I should consider it again. I don't mean to be indecisive about it, but it is a matter of some importance and I can't say that I gave it considerable thought before, nor do I recall whether it was contested.

Now it is contested. I think I should give some consideration to that.

MR. COLLINS: I would like just to add on the record in connection with this document that I think it is clear from the body of the document that Mr. Dreyer is writing on behalf of and representing Shenandoah Music's position.

MR. TOPKIS: I am not at all sure of that.

THE COURT: In my bones I feel it is very, very remote and not the kind of evidence I like to have before me when I am deciding a case.

I like to decide it on facts. I would like to have somebody brought in who can be questioned about this.

MR. COLLINS: Your Honor, the reference to the ground rule I just referred to is trial transcript page 939.

THE COURT: Can I see it a minute, please.

I can't say this was a very decisive ruling. I said, and I am glad to see that I was cautious enough to say, "I don't know, I never had the question, and I don't think anybody else has either, what the application of it the yearsay rule is to a person who is identified and is a member of the class although not a named defendant.

"I think it would be the same rule as would apply to a named defendant."

Mr. Topkis then said, "It may be, but I take it we are in accord that we will proceed on a name by name basis."

I said, "Yes." I don't really think that was a very decisive ruling on the issue of whether it did apply and I will look into it and make a more specific ruling on the point.

MISS KEARSE: May I point out to your Honor that in questions concerning discovery members of the class have been deemed not to be parties insofar as the rule makes a distinction between parties and non-party witnesses.

THE COURT: Right.

MR. TOPKIS: The next one I take it--

MR. COLLINS: The next numbered is PX 481 and perhaps we should treat this in the same way.

Perhaps you would reserve decision on that document.

THE COURT: Will you please explain it to me then, so when I am considering it I will know what I am considering.

MR. COLLINS: This is a letter in which Mr. Dreyer states the problems he would have in connection with licensing synchronization rights.

THE COURT: All right.

MISS KEARSE: May I ask your Honor whether you intend to make your decision on these documents before Mr. Topkis is finished putting his case in and before we start putting ours in?

THE COURT: I hope to do it by Monday. I can't promise you, but I hope to.

MR. COLLINS: The next document I offer is PX 161. This is again on the same subject. I will be going through them now.

THE COURT: Right.

MR. COLLINS: A letter from Burton Lane to Music Publishers dated October 2, 1959.

MR. TOPKIS: That's in evidence as AX 184, I believe.

MISS KEARSE: Yes.

MR. COLLINS: I will withdraw it.

THE COURT: All right. I gather ASCAP put that in.

jhe 8

MR. TOPKIS: Yes.

MR. COLLINS: PX 163 is an excerpt from the Minutes of the Contract Committee Meeting of the American Guild of Authors and Composers.

This is again relevant--

THE COURT: Was Mr. Lane questioned about that?

MR. COLLINS: Burton Lane was present at the meeting.

THE COURT: Did he testify before it?

MR. TOPKIS: No.

MR. COLLINS: No, but it was authenticated.

THE COURT: At least everybody had the opportunity to ask him about the meeting?

MR. COLLINS: Yes.

THE COURT: What does it purport to prove?

MR. COLLINS: This document proves that AGAC was willing to grant a waiver here provided certain conditions were granted by the publishers in return.

MR. TOPKIS: I can't believe this style of proof. I am sorry. Lane was in court. This document was in existence. The plaintiff chose not to ask him anything about it. The document verges on the incomprehensible.

I don't challenge that it is an accurate excerpt from the minutes, but now to have the plaintiff offer it

and say I should have asked Lane about it at the time he was on the stand is to me absolutely absurd.

There have to be some limits to a trial. Other- proliferate endlessly.

MR. COLLINS: Your Honor, I think that this document does demonstrate at the very least the state of mind about the situation.

MR. TOPKIS: Will you read it, your Honor? It is gibberish.

THE COURT: Whose state of mind?

MR. COLLINS: AGAC.

THE COURT: AGAC doesn't have a state of mind.

MR. COLLINS: This is an excerpt--

THE COURT: I really must agree with Mr. Topkis. Why didn't you ask Mr. Lane when he was on the stand if this fairly reflected the point of view of those at the meeting?

MR. HRUSKA: Do we have the deposition testimony on this?

MR. TOPKIS: No, of course not. The deposition is not in evidence.

MR. HRUSKA: That's right. It is authenticated under the stipulation.

MR. TOPKIS: I don't challenge its authenticity.

THE COURT: I won't accept this under the circumstances and in view of the fact that, after all, AGAC is not on trial here. Primarily it is ASCAP and BMI.

MR. COLLINS: Your Honor, members of AGAC are members of ASCAP or BMI. I would think perhaps there is a rare exception somewhere.

THE COURT: Mr. Collins, I thoroughly understood the picture when Mr. Lane testified. These little bits and pieces aren't going to make me feel any different from the conclusions that I drew from what he had to say.

It was perfectly obvious most of the people, certainly the ones on the West Coast, were highly opposed to what was going on. I understand that. I don't think that is going to decide the case. That is one of the building bricks in this edifice.

MR. COLLINS: The next document I offer in evidence is PX 71.

MR. TOPKIS: Are you skipping 164?

MR. COLLINS: Yes.

MR. BRUSKA: 164 is in the same category as your Honor's former ruling.

MR. COLLINS: This is PX 71.

This is a letter on the letterhead of AGAC in which Miriam Stern brings to the attention of music publishers that they are taking certain actions which violate the AGAC contract.

I offer it to show the state of mind of AGAC, the state of mind in connection with collective action against publisher attempts to violate that contract.

I also offer it for purposes of demonstrating that Harold Spina is listed on the letterhead of this as the Chairman of the West Coast Committee.

There was some testimony about Mr. Spina's functions on West Coast and I think it is relevant.

THE COURT: I will accept it for the purpose of establishing that Harold Spina was on the West Coast Committee.

Rather than put the document in evidence for that purpose, will you stipulate to that effect?

MR. TOPKIS: Yes, your Honor.

MISS KEARSE: Yes.

MR. HRUSKA: There is a slightly additional purpose, your Honor, not simply to show that he was the Chairman of the West Coast Committee but to show that the West Coast Committee was a sufficiently formal part of AGAC to be listed on the AGAC letterhead.

THE COURT: I take it the stipulation includes that.

MISS KEARSE: Yes.

MR. TOPKIS: Yes.

THE COURT: And that's consistent with the conclusion I got from hearing Mr. Lane, that they were a relatively formalized entity within AGAC.

MR. TOPKIS: They were a self-proclaimed organizationed unit within AGAC but whatever he said, he said.

MR. HRUSKA: While Mr. Collins is getting the next batch of documents, I would like to make, just for the record, your Honor, an offer of proof to the effect that we do believe that the state of mind of the AGAC organization is a relevant factor in the lawsuit.

THE COURT: Well, you may be correct and I need not rule on that at the moment but, aside from the other reasons I have given, I decline to accept these documents

as being cumulative in nature.

MR. COLLINS: I am moving now to a group of documents which generally relate to AGAC relationship to the 3M attempt to direct license and the first document I would offer in that group is PX 103, a letter from Edward Elliscu, President of AGAC, to Mr. Stanley Adams and this shows Mr. Elliscu's state of mind as to the role AGAC played in the promoting the match between ASCAP and 3M.

THE COURT: Well, isn't this problem pretty much the same as the problem that I've reserved decision on?

MR. COLLINS: Well, he was not called as a witness.

THE COURT: No. But I mean his status within the case.

What's Elliscu's office or position?

MR. COLLINS: He was president of AGAC.

THE COURT: Was he writing as president of AGAC?

MR. COLLINS: Yes, and signing underneath as president of AGAC. The document was authenticated again at deposition and under the pre-trial stipulation--

MR. TOPKIS: I have no objection to its being received as a document which came to ASCAP's attention but it certainly is not proof of its contents.

THE COURT: But you are saying--

MR. COLLINS: That is was written and that Mr. Elliscu said what he said therein and that showed his attitude.

THE COURT: Did I understand there attitude. I don't think I need 15 or 20 documents to establish it. There does seem to me to come a time when we are going to paper ourselves over.

I mean, your brief is certainly not going to refer to every possible statement ever made by every possible AGAC representative, is it, and I am not going to read every one of the documents if they are in evidence.

MR. HRUSKA: Of course not, particularly ingredient of the AGAC reaction to the 3M, to which this document refers, is the great interest that AGAC had in bringing ASCAP and 3M together.

Mr. Lane did give testimony on that, your Honor and I think most of the picture is covered by Mr. Lane's testimony.

There are one or two documents in this series which fortify Mr. Lane's testimony and that's really the simple basis of the offer.

As I understand ASCAP's position, they don't object if the document is offered simply on the state of

mind and that is the limit of the offer.

THE COURT: I don't even understand, and maybe I didn't get the gist of the cross examination of Mr. Lane, but I didn't understand any serious dispute with CBS' attempt to bring out Mr. Lane's and AGAC attitude.

The question is what is the significance of that attitude in this case.

MR. TOPKIS: Absolutely.

THE COURT: For that reason, I don't know why we need a whole further sheaf of paper to establish the point of view.

Is that whole group in relation to this same general subject?

MR. COLLINS: Well, it is in relation to AGAC's involvement in the 3M incident. They are not all just precisely on the same point as this one.

3B

jbb-1

MR. TOPKIS: You can't believe how peripheral these are unless you, God forbid, take a look at one of them.

THE COURT: I just think it is a question of, I suppose I can say, overkill and I suppose I can't commit myself to a certain finding on this subject, but I certainly have indicated to you what my reaction is. I don't think you have anything to worry about from the Court's point of view or the point of view of your opponents, to the issue that you are trying to prove by these documents and were that so, I don't see any value to any of us to have that many more papers to deal with.

MR.COLLINS: I think it would be relevant to point out --

MR. HRUSKA: Let me say this, your Honor. I am greatly in sympathy with that point of view and I think to some extent it may well turn out, your Honor, after the fact, which is after we write findings and what have you, that we have put in some documents which are cumulative on this point.

My only reason for talking at this point is that before you write findings of fact, it is so difficult to pick out exactly which one of a particular series you

are going to put in evidence and I submit, your Honor, I really think, particularly because we are not dealing with earth-shattering pieces of paper here but we are dealing with small pieces in a jigsaw, that it really doesn't want the time that we are spending arguing about them.

THE COURT: Well, that point can be made both ways, Mr. Hruska.

MR. HRUSKA: I know it can. But we have gone to a great deal of difficulty and expense in compiling these documents. There were great efforts exerted vis-a-vis AGAC and the production that we received fromAGAC and, yes, your Honor, I think perhaps we could have made a more finely developed selection of these documents, but if we put in four pieces of paper rather than two pieces of paper on this single point, is that really going to affect everybody so badly that we ought to be getting into such long discussions about each one of these documents?

They are relevant, each one individually is relevant. The valid objection is made that perhaps they are cumulative.

THE COURT: That is one and the thing that does concern me, and then we have, when the findings of facts or the briefs or whatever they are submitted, there are going to be all kinds of little quotes, and I am going to

have to look at the papers and see whether I agree that your quotation truly reflects what was written in there, and so it is not quite as simple as you make it but, more than that, the question is whether it will illuminate the picture and, finally, you know, what the total significance in the case is. Miss Kearse?

MISS KEARSE: Nothing that has been said gets over the first obstacle. This just is not competent proof.

MR. HRUSKA: This is an authenticated document.

MISS KEARSE: It may be, but it is still pure and total hearsay. You are offering it for what it says.

MR. COLLINS: It is offered to show state of mind.

THE COURT: I don't quite understand why that isn't hearsay. It is offered, as I understand it, to show the proof of the fact that AGAC felt as indicated in that letter.

MISS KEARSE: I am not even sure it is competent to prove that. This is a letter from Eddie Eliscu. It may show how he feels but I am not sure that it is attributable to AGAC.

THE COURT: In my mind, there are too many objections to warrant the introduction of that group of documents and I decline to receive them.

MR. COLLINS: There are other documents in here.

THE COURT: I am talking about the ones on the subject you have been talking to me about. I don't know how many of them there are.

You can go on to the next.

Can I, for a moment, see Mr. Hruska and Mr. Topkis and Miss Kearse in the robing room.

(Recess.)

(Adjourned to Friday, November 30, 1973, at 11:00 A.M.)

November 29, 1973 3524- 1

PAGE	LINE(S)	ERROR	CHANGE TO
3380	11	understand	understood
3380	16	Mr.	Miss
3381	8	already	all right
3382	7	Marx	Marks
3384	7	to?	by?
3384	16	beat	defeat
3387	2	J	J.
3389	23	Mr.Adler	Mr. Adler
3390	13	Mr.Adler	Mr. Adler
3391	14	Mr.Adler	Mr. Adler
3399	9	deminish	diminish
3399	23	wayy	way
3399-3408	1	redirect	recross
3401	8	operation	option
3403	4	remember	recommend
3406	21	advise and belief,	advised and believe,
3407	13	performed	formed
3407	22	didnot	did not
3409	1	recross	recross/redirect
3410	20,22	agencies	agency
3412	18	h t eplace-	hit replace-
3413	16	Griffin	Griffith
3415	18	thinkit	think it
3415	19	,but	, but
3415	20	it be	it can be
3415	20	thenthe	then the
3416	2	people don't look	people look
3416	5	lo-k	look

PAGE	LINE(S)	ERROR	CHANGE TO
3416	16	understanding?	understanding
3416	19	theWaltons	the Waltons
3419	14	:That	: That
3421	10	I	You
3421	14	,you	, you
3421	21	ofmusic	of music
3423	19	strike	(delete)
3425	17	producers	producers'
3426	7	gambel	gamble
3426	22	invariables	variables
3427	18	F t	But
3429	13	CArol	Carol
3434	6	Number 1,	Number 2,
3435	3	Sunda	Sunga
3435	11	change	changed
3437	6	some	in some
3438	22	approacimately	approximately
3440	2	MR. BLUMSTEIN:	MR. GITTER:
3441	2	A	Q
3442	14	Fantacia	Fantasia
3442	23	Rachmaninov	Rachmaninoff
3442	24	rapsody	rhapsody
3442	25	Copeland's	Copland's
3443	3	Copeland-Green	Copland-Green
3443	19	avante guarde	avant-garde
3444	23	Copeland's	Copland's

PAGE	LINE(S)	ERROR	CHANGE TO
3445	13	one	won
3446	15	minor	minimum
3448	22	synch lip synch	sync, lip sync,
3448	23	device is	devices
3448	25	metholo	delete entire word
3448a	2	methodology, hear	methodology here,
3448a	3	is writes	is, writes
3450	25	Gitter, usually,	Gitter. Usually,
3452	2	1957	1967
3454	5	,so	, so
3456	19	whenwe	when we
3457	2	silm	film
3459	3	esthetic	aesthetic
3460	10	y our	your
3463	19	,sir	, sir
3464	2	mentionthat	mention that
3464	5	songwriters protective association	Songwriters Protective Association
3464	22	,you	, you
3465	10	ThenAGAC	Then AGAC
3465	19	cogent	urgent
3466	13	Guilt	Guild
3469	8	,I	, I
3472	10	inmy	in my
3474	20	whenfinancially	when financially
3475	6	,but	, but
3478	24	Prices?	Prizes?
3480	7	Poney	Pony
3480	19	Jack Ametti	Giacometti
3482	10	Naughton	Norton
3483	18	Naughton	Norton

PAGE	LINE(S)	ERROR	CHANGE TO
3483	24	Mc Dowell	McDowell Foundation
3484	14	Copeland	Copland
3485	7	licenses	licensees
3489	12	outisde	outside
3489	11	Verde	Verdi
3489	14	inthe	in the
3489	20	AndBen	And Ben
3490	4	Bern,	Berg,
3490	5	Stokhausen	Stockhausen
3490	5	Ravelle	Ravel
3490	8	fromyour	from your
3490	18	tenyears	ten years
3491	4	SESAC	a SESAC
3491	13	PMA	MPA
3492	14	and ask	when I asked
3492	16	fromASCAP	from ASCAP
3492	17	see-ing	seeking
3492	22	also	else
3502	3	standardAGAC	standard AGAC
3508	17	Gospel	gospel
3509	16	"Re"	"Re
3511	7	yearsay	hearsay

3524- 5

GE	LINE	ERROR	CHANGE TO
517	17	tioned	tional
522	5	piec es	pieces
522	12	fromAGAC	from AGAC
523	20	Eliscu	Elliscu

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge.
vs.	
AMERICAN SOCIETY OF COMPOSERS, Authors and PUBLISHERS	69 Civil 5740

New York, November 30, 1973

STENOGRAPHER'S MINUTES

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

Columbia Broadcasting System

vs. 69 Civ. 5740

American Society of Composers, Authors and Publishers, et al.

New York, New York.
November 30, 1973
11:00 A.M.

(Trial resumed.)

THE COURT: Mr. Collins.

MR. COLLINS: Your Honor, we did go through our documents last night. I think we were able to slim it down considerably.

THE COURT: I appreciate your effort.

MR. BAKER: The first one I would like to offer, your Honor, is Exhibit 1 to our designation of documents. It has not been given a PX number. This simply describes the manner in which our computer study was prepared. It was submitted to counsel pursuant to a pretrial order and in the course of Mr. Pokliter's testimony I did ask him whether it was an accurate description of the time periods in which the programming was taken, the duration of the Programs and the item of the programs appearing during those time periods which contained no music.

He answered that it was. I also asked him if

he had examined it prior to the time it was submitted to counsel. He said that he had.

I simply offer that because it will make it easier if anyone wants to replicate what we did.

MR. TOPKIS: Your kindness overwhelms me. We have no objection, your Honor.

MR. BAKER: You objected in your letter.

THE COURT: I am willing to accept all waivers of objections.

MISS KEARSE: If it has no number, it is hard for me to find it.

MR. COLLINS: 468.

THE COURT: Do you know offhand whether BMI objected?

MR. BAKER: My recollection was that both of them had objected, your Honor.

MISS KEARSE: Yes, we objected.

THE COURT: I will accept it subject to the right of either defendant or any other party when CBS to point out to me any way in which it differs from the testimony of Mr. Pokliter.

(PX468 received in evidence.)

MR. BAKER: The next one, your Honor, is 3M PX145 for identification. BMI objected on the ground that it

was irrelevant and inadmissible. ASCAP stated no objection. Basically, this is a letter from Mr. Timberlake of Paramount-Famous to Allen Arrow declining to enter into an agreement on the MT100 cartridge.

THE COURT: Mr. Timberlake was then with whom? And he is now with BMI, isn't he?

MISS KEARSE: No.

MR. TOPKIS: He was a functionary of --

THE COURT: He is a lawyer. I know he is a lawyer.

MISS KEARSE: I believe he is an outside lawyer.

MR. BAKER: I think Mr. Herman's deposition indicates he was not an employee of Paramount-Famous, but was an employee of a company one step further.

THE COURT: But in the Paramount group.

MR. BAKER: Yes.

THE COURT: Is Paramount involved in this case in any way?

MR. BAKER: Yes, they are a party.

MISS KEARSE: Paramount-Famouse is a party. What portion of the deposition are you referring to?

MR. HRUSKA: The letter is being offered simply for the fact that this was stated.

MISS KEARSE: That Mr. Timberlakd sent a letter on December 1, 1946? That fact is not relevant to this proceeding. I suggest that this is being submitted for what the letter states.

THE COURT: I think Miss Kearse' analysis of the purpose of these submissions is a correct one, that when you put in a letter and ask me to consider the substance of the letter, you are, in effect, asking me to consider that for the truth of the matter set forth there. He is not talking about somebody else, he is talking about himself.

You are asking me to bear in mind that that is his attitude. That doesn't mean it is not admissible and for that reason.

MR. HRUSKA: The fact he stated what he stated.

MR. BAKER: It is actually a decision not to -- it is the culmination of Paramount's consideration of the M700 proposal and they decided not to enter into the agreement. It is Page 44 and Page 45 of the Herman deposition.

THE COURT: All right. I will receive it.

MISS KEARSE: I think it is very dangerous to receive some of these letters, your Honor, from people who have not been deposed and so forth. Some of the letters

that have been offered in this case have been shown to have been written facetiously or to mean things other than the inferences that are suggested from them.

THE COURT: If Timberlake -- if Timberlake spoke for a party in the case, I think the situation is different. I have not yet made a definitive ruling with regard to members of class, although I am coming to question what I had to say about it at the earlier time in the record until I can find some law on it at least.

It does seem to me something coming from the documentation of a party to the case is admissible and, of course, if you wish to call Mr. Timberlake and question him about it, you are free to do so in case you believe there are any qualifications involved.

MR. BAKER: Your Honor, 3M PX146 also relates to the Herman deposition that was introduced at that time.

THE COURT: Who is Herman again?

MR. BAKER: Sid Herman is the general manager, I believe, of Paramount-Famous. Mr. Timberlake is no longer with the company.

It is a letter from Mr. Lindgren to Mr. Timberlake. It was introduced in the deposition. It has been authenticated by stipulation and it simply sets forth a portion

of the communications which were exchanged between 3M and Paramount-Famous in the course of negotiating on the M700.

THE COURT: I take it your position is the same on this.

MISS KEARSE: There is certainly no suggestion that Mr. Lindgren is or was speaking for a party in this.

THE COURT: Who --

MR. BAKER: He was the man in charge of the 700 project for 3M. I think in the context of the deposition, where it is possible to know what 3M said to Paramount-Famous --

THE COURT: I feel differently about that. Lindgren may or may not have stated accurately what other people -- what he recalls other people as having said. Insofar as he makes a statement for himself of course 3M is not a party to the situation. As a general rule, a party to a case is stuck with what he said in writing or orally. I don't think that a non-party can speak for a party.

MR. BAKER: I am really-- the letter is a communication from 3M to Paramount-Famous.

THE COURT: I understand.

MR.BAKER: It seems to me that in trying to

interpret Paramount-Famous' response to the entire proposal and negotiations, it is useful to have in the record the communications received by them.

THE COURT: It is useful to you. I think if you want to prove that, you have got to call Mr. Lindgren and say, did so and so say such and such to you. I am talking about the competence of the document. I don't consider it is competent to establish anything against Paramount. I don't doubt that may be what happened. I am talking about fundamental rules of evidence as I understand them.

MR. HRUSKA: Let me do so, Bob.

I would like to respectfully disagree with your Honor on that in terms of --

THE COURT: I don't know if you like to respectfully disagree. You do respectfully disagree.

MR. HRUSKA: I do. This letter it seems to me, your Honor, does fall into a classic exception to the hearsay rule. This is part of the 3M proposal to Paramount-Famous. There is no question about the authenticity of this letter. We have had testimony about it being received by Paramount-Famous.

The proposal made by one party to a negotiation,

contractual negotiation, to another party, is an operative fact. This letter is not being offered for the truth of the statements in here, but the fact that this was the proposal made by Mr. Lindgren who was identified by Mr. Arrow as being the chief representative of 3M inconnection with these negotiations. This proposal made by Mr. Lindgren on behalf of 3M to Paramount-Famous is operative fact. It is indispensable to an understanding of Paramount-Famous' reaction. It is not hearsay because it is not being offered for the truth but simply the fact that 3M made this proposal to Paramount-Famous.

That, your Honor, I submit is a very clear except to the hearsay rule.

THE COURT: What is the exception?

MR. HRUSKA: The exception is an offer by one party in a contractual negotiation to another party in that negotiation.

THE COURT: Let me take a look at it again.

MR. TOPKIS: Is there an offer in here? I am having trouble understanding.

THE COURT: Where is the proposal? What are you referring to as the proposal?

MR. HRUSKA: 146.

THE COURT: You look it over and tell me what

it is you consider to be a proposal.

(Pause.)

MR. HRUSKA: This letter by 3M does not contain all of the terms of the proposal. It does clarify some terms. He says that 3M is going to take a calculated risk and begin to record Paramount-Famous songs, and if Paramount-Famous decides to participate in this program, 3M will have these recordings ready . So that Paramount-Famous can come in at an earlier date and he repeats the fact that we would like to have your great repertoire of music included in these tapes and hope you come to a favorable decision by the time I return in December.

THE COURT: I can't say I consider that to be a proposal. I consider it to be an announcement of what 3M is going to do.

MR. HRUSKA: It is not the entire proposal. It is certainly none of the essential terms of the proposal. All it does is to clarify some aspects of the proposal that had previously been made and which is in evidence.

MISS KEARSE: The proposal is in evidence.

THE COURT: To calm everybody's nerves, at least as far as the documents I have seen up to the moment, I really don't think that they are going to have, whether I let them in or I don't, any substantial effect on the out-

come of this case which turns on muchgraver and much more ground and much more complicated questions. That is just a general observation.

I continue to believe that this document is not properly admissible under the rules of evidence. May we go on to the next item?

MR. BAKER: I would like to state for the record I would not offer 3M PX150, 151 and 152 because I think they come under the same ruling.

THE COURT: If you want to offer them and have me -- you offer them, tell me the same general conditions relate to them, and the ruling is the same.

MR. BAKER: This is a draft 3M PX150, sent by 3M to Paramount-Famous which I think does --

THE COURT: But not entered into?

MR. BAKER: It wasn't signed, no, sir.

THE COURT: All right.

MR. HRUSKA: This certainly is a proposal.

MR.BAKER: I would have thought so.

THE COURT: You didn't tell me in your first statement. You didn't say that you considered it to be different in that respect.

I will reserve decision on this subject to your

bringing to my attention a case which you think justifies the admission of such a proposal.

If there is law to support their position, I will consider it.

MISS KEARSE: That is 150?

THE COURT: Yes, 150, and defense counsel are invited to bring any cases they wish to my attention on that question.

MR. BAKER: 3M PX152 is simply the covering letter with which it was sent.

MR. BAKER: 3M PX 158, ASCAP has no objection. BMI objects only on the grounds of inadmissibility.

MR. HRUSKA: I thought I had put this in evidence when Schulman was on the stand, your Honor. He certainly testified about this.

THE COURT: What did he testify as to this document?

MR. HRUSKA: He testified about the number of songs being considered between the Richmond organization and 3-M at this time.

THE COURT: Yes, he did. A question whether it was 12 or 50?

MR. HRUSKA: Yes, exactly. This is a document on that point.

MR. KEARSE: Your Honor, we will withdraw our objection if it is offered only against Hollis Music which is a member of the Richmond organization and a named party.

THE COURT: If it is only offered against them?

MR. KEARSE: Yes.

MR. HRUSKA: Isn't this your stipulation ground?

MR. KEARSE: No. If it is offered against a party, the party that wrote it, then I have no objection to it. If it is offered against any other party that I represent, then I do object.

MR. BAKER: To the extent that it would bear upon the by-pass and to the extent the stipulation is

applicable to that, it will also be offered against BMI.

THE COURT: I will accept it on that basis. I'm not deciding just because I say that that falls under the stipulation.

MR. BAKER: Your Honor, here are two documents which were used, 3M PX 160 and 3M PX 161. It is a covering letter and form of agreement sent to TRO and it falls in the same category as the previous proposals.

THE COURT: I will reserve ruling on those exhibits on the same basis as the one I mentioned before. You better segregate those.

MR. BAKER: 3M PX 165, ASCAP has no objection. BMI objects only that it is inadmissible. I assume, therefore, that it goes in and is binding on BMI only to the extent that it was brought into the stipulation.

THE COURT: Assuming that is the basis of their objection.

MR. KEARSE: The basis of our objection was that it was not binding on BMI, yes, sir.

THE COURT: It is accepted in accordance with our developed rule on that subject.

xx (PX 165 received in evidence.)

MR. BAKER: 3M PX 166 was not objected to by ASCAP and was objected to by BMI on the same basis.

THE COURT: Same objection.

MR. KEARSE: I'm sorry, I missed the number.

THE COURT: 166.

MR. KEARSE: Your Honor, our objection is to the extent that there is an admission exception to the hearsay rule, your Honor, that exception is limited of course to the party that made the so-called admission.

THE COURT: Let me say with regard to this question of admissions that I will accept the document in all cases where their's an admission made by a party. I do not recall at the present time the extent to which such a document may have any effect vis-a-vis any other party.

It is in the record and you are free to argue to me the extent to which it should be binding on another party.

The only reason I consider that it might be--I haven't reviewed the pleadings to determine the extent to which claims of conspiratorial conduct are made and whether they are made with regard to any specific parties, and I don't propose to stimulate CBS to amend its pleadings for that purpose, but the evidentiary ruling might be affected by that question. So it is admitted at this time without a determination as to the exent of its applicability to anybody except--this would be Richmond, is that right?

MR. HRUSKA: Yes. It is part of the Richmond Group.

MR. KEARSE: It is very difficul: to figure out how much defense to put in your Honor, when something that appears to have limited admissibility may be later determined to be admitted against all--

THE COURT: Then I'll have to ask that before we conclude the proceedings we make a note of these questions and we look into them in a business like way and reach decisions.

With this host of documents I frankly don't feel, without having looked at the pleadings and considered some of the questions that arise, that I can make more than that kind of a determination at the time.

MR. TOPKIS: Not to make us all feel too foolish, but this document I am advised was admitted when Mr. Shulman was testifying.

THE COURT: It hasn't been indicated on here. Their's no question about that now?

MR. BAKER: I was under the impression four documents were admitted. When I checked the record I only found a place where two documents were admitted.

THE CLERK: This was admitted.

THE COURT: In any event, the discussion was worth while.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE (N.Y.) 10007 TELEPHONE: COrtlandt 7-4580

MR.BAKER: 3M PX 172 falls within the same category as contract proposals which were not executed, in one sent to Chappell.

THE COURT: Decision reserved as indicated on earlier such documents.

MR. BAKER: PX 167, PX 168, 169 and 170 all concern the negotiations between 3M and the Edwin H. Morris Company for mechanical rights licenses to the M1200 sum.

Mr. Morris on his deposition testified that they could not be bothered with the M700 project because it did not involve a sufficient amount of money. These documents came from the Edwin H. Morris files and they indicate that Edwin H. Morris could be bothered for a sum as small as $120.

MR. TOPKIS: Your Honor, I didn't object--

THE COURT: Is Morris a party?

MR. TOPKIS: Yes, your Honor.

MR. HRUSKA: Yes.

MR. KEARSE: I believe that PX 168, 169 and 170 were not even authenticated. I believe 167 was authenticated, but I still objection the ground that it is irrelevant and that if admissible as an admission of a party, it is only admissible against that party.

THE COURT: Mr. Topkis.

MR. TOPKIS: Your Honor, you could show that

Buddy Morris once tried to save 35 cents by walking instead of taking the subway. On that theory that too would be admissible. This is just cluttering our record, I think.

MR. HRUSKA: That is a question of weight, your Honor.

THE COURT: It is a question of weight. It seems to me it is so peripheral that I will decline the offer.

MR. HRUSKA: May I have just one very brief moment, your Honor?

We did have a great deal of testimony from Buddy Morris during his deposition regarding his reasons for turning down the M-71 offer by 3M. Basically they came down to the offer--offer was peanuts. There was too little money involved to justify his and his staff taking the staff to negotiate a couple of years later on the mechanical rights transaction.

After 3M and ASCAP had concluded a deal on the M1200 Buddy Morris and his staff or his staff took a great deal of time as these documents show negotiating, reviewing drafts and revising drafts for 3M on a transaction that called for about 120 dollars.

THE COURT: Let me say this. If you put that document in evidence and you were then to argue the theory

you have just argued, I would pay no attention to it. I would want to know from the man what his explanation was. I don't think that I can be expected to decide issues as grave as you put before me on a checkerboard of papers where I haven't heard the man who wrote the letter to explain what he had in mind.

MR. HRUSKA: We had his deposition.

THE COURT: If you are putting that in evidence--

MR. TOPKIS: It is in.

MISS KEARSE: It is in.

MR. HRUSKA: We didn't have these documents when we took Mr. Morris' deposition. We did have--

THE COURT: You didn't have them?

MR. HRUSKA: We didn't have them then, no.

THE COURT: It is as if he had testified and you are offering this as something that is inconsistent with his testimony.

MR. HRUSKA: Yes, exactly.

MISS KEARSE: AIt is as if he testified without benefit of being asked about these documents.

MR. HRUSKA: To make it more precise, he was asked about the mechanical rights side of it. He said he didn't personally--

THE COURT: If it is important to you, I'll give you the opportunity to depose him further and ask him about

that question and add it to his deposition. I think that is the right way to do it.

MR. TOPKIS: It may be, your Honor. You know what? You give him that opportunity and they will take it.

MR. HRUSKA: The reason I won't take it, your Honor, is because when we asked him on his deposition about mechanical rights, he said he didn't personally get involved with that. That was handled by Mr. Gerson and various other people on his staff. We did take Mr. Gerson's deposition. He gave some testimony about this situation.

You took Gerson's deposition, if you want to speak to it. The lump sum of it, the net of it, is that these documents reflect a state of facts which is inconsistent with Mr. Morris' testimony.

THE COURT: I am afraid that my attitude towards the dependability of documents as evidence is more complicated than yours. That doesn't necessarily make it better, I happen to be the judge.

MR. HRUSKA: Yes, that is an important consideration.

THE COURT: While goodness knows when something appears vital it cannot be disregarded. To get a true picture of it I would want an explanation. I have indicated the way I would be willing to handle the matter if and only if it is a matter of significance in the case, because I don't think I should establish a rule that whoever wants to reopen depositions can reopen them, but I would be open to that method of handling the situation if you convince me that it is worth it in the interest of justice.

MR. HRUSKA: Are you ready to go?

MR. COLLINS: I offer PX 442, 443, and 449. ASCAP has no objection to these documents. BMI objects on the grounds that they are irrelevant unless offered for a proper limited purpose.

These are BMI's forms of publisher and writer affiliation agreements, which were in effect at the time this lawsuit was brought and, quite frankly, your Honor, I cannot conceive of any two documnts besides the BMI affilia-

tion agreement and the ASCAP affiliation agreements which are anymore important.

THE COURT: What type of agreements are these?

MR. COLLINS: Affiliation agreements between BMI and each of its writer or publisher members.

THE COURT: You cannot think of any document that is more important than BMI's what other?

MR. COLLIN: Than this agreement and ASCAP's membership agreement.

THE COURT: You mean this is one of the most important?

MR. COLLINS: That's right. This is the basic agreement between BMI and its members.

MR. KEARSE: I would like to know what the relevance of it is to this lawsuit. We concede we have writer-publisher affiliates.

MR. HRUSKA: Through these documents we can see that.

MR. KEARSE: But it is not an issue.

MR. HRUSKA: The terms of the affiliation are very important facts in this case.

MR. KEARSE: Which terms?

MR. HRUSKA: All terms.

THE COURT: I believe that the terms of the

affiliation may be of importance in the case and I haven't got any idea what they are, I haven't seen it before, but I will receive them. If they are not important, that is the end of it.

MR. COLLINS: Your Honor, I would like to ask at this time through you that we be supplied, as we have previously requested and I believe by trial subpoena, with the current forms of BMI writer and purblisher affiliation agreement.

THE COURT: Has there been refusal?

MR. COLLINS: They have not been supplied.

MR. DAVIDSON: They have been in court every day since the trial commenced in May and we have had no requests.

MR. HRUSKA: Other than the subpoena.

MISS KEARSE: They were brought to court as required by the subpoena.

THE COURT: These days people don't obey subpoenas so why should you.

Would you please furnish them with a copy of that, gaps and all.

MR. COLLINS: I offer PX 430. I offer it only against ASCAP and ASCAP has no objection to it. This is an ASCAP answer to interrogatory.

THE COURT: Under those circumstances I reluctantly

admit it.

(PX 430 received in evidence.)

THE COURT: Had either ASCAP or BMI thought of agreeing to allow CBS to admit any two-thirds of the documents they wish?

MR. HRUSKA: Yes.

MR. TOPKIS: No, that was the proposal CBS made to us, but because that would involve admitting two-thirds of the Encyclopedia Britannica, we said no. I in reply said they could introduce any 50 documents they want.

MR. TOPKIS: 4:30 I believe is a confidential document and let me note on the record that we would like it so treated.

THE COURT: It will be treated accordingly.

MR. COLLINS: I offer PX 483 and PX 534.

Your Honor, ASCAP and BMI have not yet had a chance to object to 483. It is a BMI answer to our interrogatory 33C and it states the ABC and NBC payments to BMI for that year. Perhaps I will withdraw that for the present time.

MR. TOPKIS: I couldn't care less.

THE COURT: Apparently it is withdrawn.

MISS KEARSE: What is the relevance of it?

MR. COLLINS: We will withdraw it.

MR. HRUSKA: It is not worth the discussion.

MR. COLLINS: I offer PX 531, ASCAP does not object. BMI objects on the grounds that the exhibit is irrelevant. These are BMI reports to stockholders for the years June 30, 1965 through June 30, 1972.

I must state that we do not have all of the report in here. Again we have requested them from BMI and have not received them.

THE COURT: What do you offer to provide by them?

MR. COLLINS: The basis for the relevancy of this offer is that without reports like this you simply cannot write findings in a monopolization case. I think in a monopolization case, in any anti-trust case, the history of their performance, their revenues is quite relevant and a necessary element of the findings.

THE COURT: I think such evidence should be available to the Court for whatever it is worth and I will receive it.

(PX 531 received in evidence.)

MR. HRUSKA: You had mentioned, do we have a subpoena?

THE COURT: That is not confidential, I take it, or is it?

MR. DAVIDSON: I don't believe that those docu-

ments have been subpoenaed. I have a copy of the CBS subpoena here and I don't find it on there.

MR. COLLINS: I think you are right, George. I had requested these on various occasions by telephone calls to you and your other associates at Hughes, Hubbard.

MR. HRUSKA: What years are we missing?

MR. COLLINS: We are missing June 30, 1960 through June 30, 1965 for each of those years and for the year ended June 30, 1970.

THE COURT: You are requesting them at this time?

MR. COLLINS: I am requesting they be supplied.

THE COURT: For completeness, as long as I have allowed the rest of them, that those should be included.

I asked whether these are confidential, are they?

MR. KEARSE: I don't believe that they have been delivered subject to a confidentiality stipulation.

MR. COLLINS: PX 461, I offer PX 461, ASCAP has no objection. BMI objects on the grounds that it is not admissible against them; that it is irrelevant and that it is not authenticated.

THE COURT: Let's treat the authenticity question first.

MR. COLLINS: This is a computer printout of the names of the members of AGAC. It was supplied to me by AGAC

counsel at my request and it was prepared by AGAC. I might just show it to you.

THE COURT: What kind of authentication would you want assuming I decide it is relevant?

Do you really want to call a witness? Would you be satisfied with an affidavit, a letter?

MR. HRUSKA: Copies were supplied by AGAC at the same time to ASCAP.

MR. COLLINS: I supplied copies at the time that I designated it as a document.

MISS KEARSE: My main objection, your Honor, is simply that it is irrelevant.

THE COURT: This is a list of the members?

MR. COLLINS: Yes, it is.

THE COURT: Do you want me to know anything more than X members?

MR. COLLINS: Let me state what I believe its relevancy would be. Under the AGAC contract, the writer must give individual consent in each instance for television uses of his music.

We will argue that that is an impediment to direct licensing. We have had testimony from Mr. Shulman and Mr. Chiantia as to the trend of significance of this organization.

I think the only way we can get real data as to the significance of this impediment is to take a look at the members and the number of songs that they own in the ASCAP performed works index, just as we will present information to you on the songs owned and the amount of music performed on CTN, that is in the catalogues of publishers who did not deal with 3M.

THE COURT: I will admit it for that purpose.

(PX 461 received in evidence.)

xx

MR. COLLINS: The next document I offer, your Honor, is PX 460.

ASCAP has no objection. BMI objects on the ground that it is not admissible against them; that it is irrelevant and that it is not authenticated.

Again this is a document supplied to us by AGAC counsel. It is a document on the letterhead of AGAC.

THE COURT: What is its substance?

MR. COLLINS: A list of the members of the AGAC counsel from 1960 to 1973.

THE COURT: Same ruling.

(PX 461 received in evidence.)

xx

MR. COLLINS: I offer PX 120. ASCAP has no objection. BMI objects on the grounds of irrelevancy and that it is not admissible against them.

This is the AGAC pamphlet. Your Honor, we have had much time about them and I think it would be important to have in the record an official statement by them as to what their functions are.

MR. TOPKIS: Forgive my interrupting--

MR. COLLINS: This is a document widely distributed.

THE COURT: We had profuse testimony from Mr. Lane on that. I don't think that we need this. We can always say that one more document doesn't make any difference when you have got 10,000, but I decline to receive that one.

MR. TOPKIS: As against us also, I trust, your Honor, because I did, in fact, object.

THE COURT: I have declined to accept it at all as against me.

MR. TOPKIS: That is the best reason.

MR. COLLINS: I offer PX 538 and PX 539. ASCAP has no objection. BMI objects on the grounds that the document was drafted by CBS; that it is not binding on BMI, that it is irrelevant and that it is not authenticated.

Perhaps these documents are PX 538, a list of the board members of the NMPA from 1960 to 1971 and PX 539, a membership directory of the NMPA.

SOUTHERN DISTRICT COURT REPORTERS
U.S. COURTHOUSE

As to BMI's first objection. Your Honor, these documents were supplied to me by Mr. Leonard Feis, who is the executive vice president of the NMPA. He supplied them to me in connection with a request made by me at his deposition.

THE COURT: You did not prepare them?

MR. COLLINS: I did not prepare them and I el believe that they are documents which NMPA keeps and refers to in the normal course of their business.

I must say I am not sure about PX 538, but on the face, that is the list of the members of their board, but on its face 539 does appear to be exactly that.

Your Honor, the basis for the relevancy of this offer is that we have had testimony from Mr. Chiantia, specific testimony about the NMPA. He has testified to the number of members. I think we should know who they are and who controls the organization. I think the only way to get a proper identification of this organization is to have this kind of material in the record.

THE COURT: Miss Kearse.

MISS KEARSE: I still haven't heard anything that connects those documents and what is in them with the issues in this case. I understand that Mr. Collins thinks that it would be nice to know these things, but what is the relevance to this case?

THE COURT: I think one of the responsibilities of the Court in this case is going to be to explain and illucidate to some extent on the structure of the music licensing individual industry and just as background information I don't think it is going to hurt to have this. I may never do a damn thing about it, but that is what I have in mind. I will receive it.

xx (PX 538 and 539 received in evidence.)

MR. COLLINS: I offer PX 022. ASCAP objects unless the entire document is received and this is one of the documents as to which I am only offering excerpts. The excerpts I want are pages 2, line 4 to page 3, line 18 and page 4 line 31 to page 5, line 17.

THE COURT: What is the document?

MR. COLLINS: This is a memorandum of ASCAP, which was submitted in the Shenandoah proceeding.

THE COURT: I will receive the whole document.

MISS KEARSE: Did you state BMI's objection. This is an ASCAP document. It can't be admissible against BMI.

MR. COLLINS: We offer it.

THE COURT: Has this anything to do with by-pass?

MR. COLLINS: Yes, I think it does, your Honor.

MISS KEARSE: Doesn't everything?

THE COURT: If it has to do with by-pass, then to

the extent of the stipulation it may be binding. Otherwise it is not binding, but it is received in whole.

xx (PX 22 received in evidence.)

MR. COLLINS: I offer PX 024; ASCAP objects unless another portion of this document is received and I am only offering page 30, line 26 through page 32, line 13.

BMI objects on the grounds that it is not admissible against them.

THE COURT: What is it?

MR. COLLINS: Your Honor, this is a brief submitted by ASCAP in the consents decree proceeding in the matter of Seckley.

THE COURT: What was the matter of Seckley?

MR. COLLINS: It was a proceeding where some members of ASCAP asked that certain allocations that ASCAP made as to payments received from ABC and CBS as to past years be allocated in a different manner than the way the society first proposed to do it.

THE COURT: I will receive it in whole because of my personal conviction that a part of a document is going to be put in and another part objects that they may wish to quote other portions of it and they should be free to do so.

MISS KEARSE: Your Honor, may we assume with respect

to BMI it is received on the same basis as other ASCAP briefs and so forth?

THE COURT: You may.

xx (PX 24 received in evidence.)

MR. COLLINS: I offer PX 404. I offer it only against ASCAP and ASCAP has no objection.

THE COURT: Good.

Settled.

xx (PX 404 received in evidence.)

MR. COLLINS: I offer PX575. I offer it against ASCAP only. ASCAP's only objection was that it wanted the entire document received. I will offer the entire document.

THE COURT: Very good. Received.

xxx (PX575 received in evidence.)

THE COURT: Incidentally, Mr. Collins, it is helpful, of course, if you acquiesce in admitting an entire document where ASCAP made an objection on the basis that you weren't offering the entire document. If you wish to save your position for the record, you are free to save it.

MR. COLLINS: I believe an admission, it is clear under hornbook law, that an admission can only be offered against a party and cannot be offered by a party in support of its own position. I would assume what ASCAP wants to do is point out something that puts the portion that I am offering or the portion that I have referred to whether I am offering it into context and I think that is proper.

THE COURT: Right. What I meant was that if you wish for the record to state that you are only offering Page 3, you may do so.

MR. COLLINS: All right.

eob-2

MR. HRUSKA: IN that last document you did not make specific reference to the portions we were offering. We do have our letter of offer that covers all of these.

THE COURT: I am not inviting speeches.

MR. COLLINS: I could read it very quickly, your Honor. I have the letter right in front of me. For PX575 I offer Page 3 -- I offer only Page 3, Line 16 to 22; Page 5, lines 1 to 12; Page 5, line 19, to Page 6, line 17, and Page 7, line 8 to 12.

THE COURT: The document was received in whole.

MR. COLLINS: In the case of PX17 I offer Page 4, Line 5 to Page 5, Line 16.

THE COURT: ASCAP wishes to put in the entire document, is that right?

MR. TOPKIS: That is a memorandum in this action?

MISS KEARSE: You are offering this only against ASCAP, 517?

MR. COLLINS: Yes, I believe so.

MR. TOPKIS: Do you have to receive in evidence a brief filed in this action?

THE COURT: I don't know anything about it, let me hear. A brief of whom?

MR. TOPKIS: ASCAP.

MR. COLLINS: A brief of ASCAP, your Honor.

THE COURT: Is already before me.

MR. COLLINS: Just for the record for the Court of Appeals.

THE COURT: If that is necessary, it is received.

xxx (PX517 was received in evidence.)

MR. COLLINS: I offer PX149. ASCAP objects to this document. BMI also objects on grounds of irrelevance.

This is an address made by Burton Lane at a meeting of AGAC in connection with the AGAC collection royalties plan.

Your Honor, the basis for the relevancy of this document, I think any industry has many characteristics. One of the characteristics of this industry is that there is an antagonism, in fact, a hostility between writers and publishers. Mr. Lane explores that hostility in this document and I offer it as evidence of the state of mind of both Mr. Lane and AGAC.

THE COURT: I am quite aware of that state of mind from his testimony and I decline to accept the speech.

MR. TOPKIS: You are going to?

THE COURT: I decline to accept the speech.

MR. COLLINS: Your Honor, I do think on this question of state of mind, state of mind is made up and

it is not really a hearsay problem. State of mind can be shown through circumstantial evidence, which is indicative of state of mind. I think just by the nature of circumstantial evidence you need to be able to look at, refer to various times upon which statements have been made.

THE COURT: First of all, I don't know that ASCAP and BMI necessarily deny that there is a strong desperateness of interest at times and there may have been bet[illegible] the 3M situation between the composers and publishers. In any event, Mr. Lane's testimony left me with that impression and my ruling stands.

I see nothing unnatural about the fact that, whatever its significance in the case, I see nothing unnatural or incredible about the fact that the composers want to have a voice in their own situation.

MR. COLLINS: I offer PX900. These are on the new designations.

PX900.

MISS KEARSE: This is not in your letter, is that right?

MR. COLLINS: This is not in my letter. It is in our designation of documents Number 2, and identified as 900 on there. We just recently received this document.

eob-5

It is a transcript of the 34th annual meeting of the American Guild of Authors and Composers and it contains a report by Mr. Kilmer, who was introduced by Mr. Lane, to give this report on the 3M matter.

THE COURT: What year?

MR. COLLINS: This was in 1965. The meeting was held just prior to the sending of the AGAC letter.

THE COURT: Is the entire document the report?

MR. COLLINS: This is it. This is the transcript. There was a tape recording, your Honor, made of that meeting.

MISS KEARSE: Why 's this competent?

THE COURT: Just a minute. The first question I am asking is whether this is the transcript of the entire proceedings or just a transcript of the report?

MR. COLLINS: This is a transcript of the entire meeting.

THE COURT: Does the entire meeting have to do with this subject?

MR. COLLINS: No, it does not. We have had no objections.

THE COURT: You had no objections because nobody has seen it so far.

MR. TOPKIS: I certainly object on just about every ground known to the rules of evidence. I start

with competence.

MISS KEARSE: I agree with that.

MR. TOPKIS: I will go on to the proposition that this document contains statements by epeople identified as "a voice." It also identifies -- I just can't mimagine its being admitted.

MR. HRUSKA: We can limit the offer to the remarks made by Mr. Kellman at the behest --

THE COURT: Am I not correct that Kellman testified?

MISS KEARSE: Mr. Kellman testified.

MR. HRUSKA: We didn't get the document until --

THE COURT: If the reasons were because somebody withheld it from you and you want to question Kelman about it, I will give you an opportunity to recall Kellman and testify about it.

MISS KEARSE: This is just pure hearsay.

MR. HRUSKA: Yes, it is true that we did not have this document until very long after Mr. Kellman testified.

THE COURT: I know that. I don't know whose responsibility that was, but assuming it was justifiable that you didn't receive it until now, my ruling is that if you consider it to be of significance, I will allow you to

eob-7

recal Mr. Kellman to question him about it, but I will not accept the document.

MR. HRUSKA: Fine. I think we will recall Mr. Kellman.

THE COURT: I think the defendants deserve an explanation as to the reason why it was not received until it was?

MR. COLLINS: I could give you those responses, your Honor. As a matter of fact, the next PX I was going to offer is PX708, which is an excerpt of the minutes of that meeting which was supplied to us in document production by AGAC. We noticed by looking at these minutes --

THE COURT: When was that submitted to you?

MR. COLLINS: This was supplied to us before trial commenced in May.

THE COURT: Yes.

MR. COLLINS: We noticed by looking at this excerpt that the meeting -- there had been discussion of 3M and a tape recording had been made of the meeting. I asked Mr. Blasband, their ex-counsel, to supply us with that because it was covered by our subpoena for Mr. Lane's deposition.

THE COURT: At that time?

mob-8

MR. COLLINS: We did finally after some discussion have a copy supplied to us during the time of trial and -- not supplied to us, I withdraw that -- supplied to the Borak Reporting Service, which, as a matter of fact, is the service Mr. Borak has used in this litigation.

THE COURT: Does that make him responsible?

MR. HRUSKA: Mrs. Borak was a very good reporte

MR. COLLINS: They did in the course of time prepare a transcript. They sent it to Mr. Blasband and he supplied portions of it to me. He did not supply Mr. Kellman's speech. He withheld that on the grounds that it was privileged.

During the course of the summer we had discussion about the privilege ground and, finally, I believe only three or four weeks ago, if that long, Mr. Blasband agreed, it was really I think only about two weeks ago, Mr. Blasband agreed to supply the document to us in full.

THE COURT: _ consider that sufficient justification for not having utilized it earlier, but the solution is if you really consider it that important and I ask you to give serious thought to whether it is to recall Kellman.

MR. COLLINS: I offer PX722. ASCAP objects. BMI objects on the grounds that it is not admissible against it; that it is irrelevant and that it is not authenticated.

eob-9

This is a copy of an AGAC bulletin, dated May 1966. The internal AGAC house organ publication.

I am offering only a portion -- well, it is Page 1, Column 1, Lines 2 to 21, and Page 3, Column 2, Lines 21 to 40.

I offer the portion on Page 1 to show the importance and the status of the West Coast committee as to which we had testimony from Mr. Lane.

THE COURT: I indicated yesterday that I was aware of that and I don't know whether this is a signed article or it isn't, but if it isn't, I am certainly not going to accept it and, even if it were, I would be very skeptical of it.

Furthermore, I consider it cumulative so it is rejected.

Please don't ask for an opportunity to discuss it.

MR. COLLINS: I think I do want to say, your Honor, the portion on Page 3 of that document I would have offered as evidence of AGAC's state of mine on the question of preferring to have licensing done through performing rights societies.

THE COURT: You have got an awfully broad view

eob-10

of these things. I don't know who wrote that article and they may be his private views, but, anyway, I have had my say.

MR. COLLINS: I understand.

PX124, ASCAP objects, BMI objects on the grounds of irrelevance and that it is not admissible against them.

Your Honor, this is a letter from Michael Goldsen of Criterion Music, to Burton Lane. Criterion Music is a publisher which did deal with 3M. ASCAP has put into evidence the agreement between Criterion and 3M, and I think the statements contained in this letter are relevant as to that publisher's state of mind as to its reasons for dealing with 3M and I really don't offer this for the truth of what is said in there, I offer it as the state of mind, the fact that he said it and what he said is of significance.

THE COURT: But, Mr. Collins, this is where I disagree with you and agree with Miss Kearse that that is offering it for the truth. It is offering it for the truth of the state of mind.

MR. COLLINS: I am offering it as evidence of his state of mind. Not that this document alone --

MR. TOPKIS: The truth.

THE COURT: I really don't understand that distinction and I don't think it is a valid distinction. Is Criterion a party?

MISS KEARSE: No, your Honor.

MR. COLLINS: As a member of the class. They are a member of the class.

THE COURT: The offer is rejected.

MR. HRUSKA: Might we submit some authorities to your Honor on the distinction between offering a document for state of mind and offering a document for truth of the facts stated in the letter?

THE COURT: You may, if there is authority. If I am wrong, I am always willing to correct my rulings.

MR. HRUSKA: Thank you. I think we will submit it in connection with this document.

MISS KEARSE: I assume, your Honor, if we can persuade you that we can get some of these documents that have been admitted knocked out?

THE COURT: I don't follow you. You also can submit authority. I will not make a decision before I have authority from anybody who wants to submit it.

I think the orderly way to do this, if you are going to submit authority, is to submit it to Jay and Miss Kearse and they can give me anything they want.

eob-12

MR. TOPKIS: You can assume from my silence that I am not going to respond to the authority.

MR. COLLINS: I offer PX820, PX408, PX410, 3M PX105, 3M pX129, 3M PX130, 3M PX131, 3M PX132, 3M PX133, 3M PX176, 3M PX177, 3M PX 178, 3M PX179 and 3M PX180.

I offer them only against ASCAP and ASCAP has no objection.

THE COURT: Good. Received.

MR. TOPKIS: Received subject to correction.

MR. HRUSKA: If there is any.

MR. COLLINS: I offer PX412. ASCAP has no objection and BMI objects that it is not admissible against it, which I assume is the stipulation.

THE COURT: Assuming that is the objection, the prior ruling is observed. It is received under those circumstances.

xxx (PX412 received in evidence.)

MR. COLLINS: I offer PX901, 902 -- these are on the designation numbers -- 903 and 904. PX901 is a letter from Mr. Topkis to Mr. Hruska supplying certain information which we requested during the cross-examination of Paul Marks and PX902 through 904 are various attachments to that letter in which certain of the information is supplied.

THE COURT: In other words, I take it they are in effect supplements to the deposition.

MR. TOPKIS: I have no objection.

MISS KEARSE: Am I correct that this is being offered only against ASCAP?

MR. COLLINS: I believe so.

THE COURT: All right. They are received.

xxx (PX901, 903 and 904 received in evidence.)

MR. COLLINS: I offer PX484. This is BMI's answer to our Interrogatory 27.

THE COURT: And in that answer BMI has supplied

the CTN payments and the total payments to the top 50 BMI writer and the top 50 BMI publisher affiliates. I believe it is subject to a protective order.

MISS KEARSE: I believe it is. I also believe that that is not an accurate characterization and that the information that is supplied is correctly identified in the answer to the interrogatory.

MR. COLLINS: Whatever the interrogatory says it is, your Honor.

MISS KEARSE: Whatever the answer says.

MR. COLLINS: I meant to say that.

THE COURT: The exhibit is received and considered to be whatever the answer describes it to be.

MISS KEARSE: I consider it irrelevant, your Honor.

THE COURT: Did you say that in your answer to the interrogatory?

MISS KEARSE: We reserved all objections -- all rights to object on the grounds of relevance.

xxx (PX484 was received in evidence.)

MR. COLLINS: Your Honor, I do have a list of documents here which I would like to offer for the record. We could go through them one at a time or I could simply

MR. COLLINS: PX128, 129, 130, 131, [illegible], 136, 138, 139, 724, and 830.

THE COURT: On your previous representations, the offer of that evidence is denied.

MR. COLLINS: I offer PX337, which is a layout of TVBG master file produced by BMI to us. This is again background --

THE COURT: You have to explain what TVBG is.

MR. COLLINS: I do not know exactly what it is, your Honor. I am offering that. I am not sure it was included in the list of PX which Mr. Hansen introduced the other day.

MISS KEARSE: Whatever it is, he offers it.

MR.COLLINS: It is part of the background material in connection with Professor Southworth's testimony.

THE COURT: It is received subject to my determination that it is relevant or subject to anybody's argument as to whether it is relevant to Dr. Southworth's testimony.

(PX337 received in evidence.)

MR. COLLINS: I have just one other matter I want to bring up I think just to make the record clear. Last May I think your Honor received as a Court exhibit the

gab-5

ASCAP-CBS stipulation of facts. I am not certain that it is clear whether the receipt of that document included the exhibits to that document. I would consider that they are part of it. I just wanted to make that clear on the record.

THE COURT: My ruling is that they should be part of it.

MR. COLLINS: That's it.

THE COURT: All right.

MR. HRUSKA: Yesterday during the redirect examination of Miss Preston, we had identified her memorandum of September 12, 1967, as PX915 for identification. It was offered and Mr. Topkis said that he had wanted to consider whether there would be any objections to it. I would like to reoffer it at this time.

MR. TOPKIS: I must acknowledge I haven't thought about it. I will before the weekend.

MISS KEARSE: I have one more matter, your Honor, and that is that when Mr. Collins first started to offer documents he read a list which I believe he said there was no objection to, and one of the items was PX162, which I believe was not mentioned in the Cravath letter.

I was not aware that it was proposed to be

gab-6

offered.

He may have meant to refer to 161, but he did say 162, which is what the transcript says.

THE COURT: Will you work that out among yourselves? If it remains open on Monday, let me know and I will do whatever is necessary.

Have a nice weekend everyone.

(Adjourned to Monday, December 3, 1973, at 10:00 A.M.)

---

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(5151-R)